

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

No. ~~547~~ 20

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE
OF FRED A. MILLER, APPELLANT,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED FEBRUARY 7, 1949.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 547

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE
OF FRED A. MILLER, APPELLANT,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

INDEX

	Original	Print
Proceedings in Supreme Court of Wisconsin	1	1
Caption (omitted in printing)	1	
Record from County Court of Milwaukee County	2	1
Notice of appeal to Supreme Court (omitted in printing)	2	1
Notice to Department of Taxation and information required by Department of Taxation	7	1
Order determining inheritance tax	9	3
Decision	14	8
Excerpt from stipulation re record and bill of exceptions	16	9
Notice of review (omitted in printing)	18	
Notice of appeal (omitted in printing)	20	
Excerpts from respondent's brief (omitted in printing)	22	
Minute entry of argument and submission (omitted in printing)	25	
Judgment		9
Opinion, Hughes, J.	28	10
Petition for appeal and order allowing same	35	15

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	Original	Print
Assignments of error	37	16
Bond on appeal (omitted in printing)	40	
Citation on appeal (omitted in printing)	43	
Præcipe for transcript of record (omitted in printing)	45	
Supplemental præcipe (omitted in printing)	47	
Clerk's certificate (omitted in printing)	48	
Statement of points to be relied upon and designation of record	49	18
Appellee's designation of additional parts of record	52	19
Order noting probable jurisdiction	53	20

NOTICE TO DEPARTMENT OF TAXATION OF HEARING ON FINAL ACCOUNT AND DETERMINATION OF INHERITANCE TAX AND INFORMATION REQUIRED BY THE DEPARTMENT OF TAXATION Sec. 72.15 (2). The original hereof shall be filed with the County Court and a copy mailed to the Department of Taxation and Public Administrator at least twenty days before such hearing. If only joint property is involved, answer all questions except 3 and 4.

STATE OF WISCONSIN
COUNTY COURT — MILWAUKEE COUNTY — IN PROBATE

In the Matter of the Estate
of

Fred A. Miller

Deceased.

Date of Death December 12, 1943.

NOTICE IS HEREBY GIVEN, that at a term of said court to be held on the first Tuesday of April 1944, or as soon thereafter as counsel can be heard there will be heard and considered the allowance of the final account of the personal representative of the above estate and the determination of the inheritance tax, if any, payable in the above entitled matter.

INFORMATION REQUIRED BY DEPARTMENT OF TAXATION AND PUBLIC ADMINISTRATOR

1. Execut. or Administrator Oscar F. Treichler
2. Name and address of Attorney A. M. Schutz, 735 N. Water St., Milwaukee 42, Wis.
3. Value of estate as appraised
Real Estate \$ 174,361.00 Conformed to Federal valuations
Personalty 6,675,167.61 " " "
Insurance paid to estate NONE Total \$ 6,849,528.61
4. Deductions:
Debts \$ 81,349.31 (Ratio 87.48%)
Mortgages or other liens
Federal Estate Tax 2,690,999.56 " "
ESTIMATED () or FINAL (X) 1,512.49 " "
Funeral Expenses 292,538.84 " "
Administration Expense 292,538.84 Total \$ 3,066,400.20
(DO NOT INCLUDE WIDOW'S STATUTORY ALLOWANCES IN DEDUCTIONS.)
Net Estate to be distributed (Deduct 4 from 3) \$ 3,783,128.41
5. Insurance paid to beneficiaries other than estate, with names of beneficiaries and amounts to each None
Total \$ Less exemption of \$10,000 \$
(ATTACH RIDER)
6. Net value of decedent's interest in joint property.
Real \$ 16,250.; Personalty \$ 4,000.; Total \$ 20,250.
Cost of terminating joint tenancy (IF NOT INCLUDED ABOVE) \$ Bal. \$ 20,250.00
Total Taxable Estate \$ 1,803,378.41
7. Was interest to date of death on notes, bonds and mortgages, etc., included in inventory and appraisal? Yes
8. Is any property of decedent omitted from inventory? No Amount \$
If so, is it included above?
9. Did decedent own any real or tangible personal property situated outside this state? Yes
Value \$ 979,936.23
(See Sec. 72.04 (3) FOR APPORTIONMENT OF DEDUCTIONS AND EXEMPTIONS.)
10. Did decedent possess the right to exercise any power of appointment? No
Yes by irrevocable trust
11. Did decedent give away any property before death to relatives or others?
(EXPLAIN FULLY ON RIDER, GIVING DATES, AMOUNTS, NAMES AND RELATIONSHIP OF DONEES AND MOTIVES)
12. Did decedent transfer any property during lifetime and retain either any income therefrom or any power of control over said property or income? No See Schedule U of Federal Estate Tax Return on file herein pursuant to Sec. 20.55

1. Executor or Administrator W. F. Treichler

2. Name and address of Attorney A. H. Schutz, 735 N. Lincoln St., Milwaukee, Wis.

3. Value of estate as appraised

Real Estate

Personalty

Insurance paid to estate

124,361.00
5,475.16
None

Conformed to Federal valuations

Total \$ 129,836.16

4. Deductions:

Debts

Mortgages or other liens

Federal Estate Tax

ESTIMATED () or FINAL (X)

Funeral Expenses

Administration Expense

(DO NOT INCLUDE WIDOW'S STATUTORY ALLOWANCES IN DEDUCTIONS)

81,349.31

(Ratio 87.48%)

2,690,999.56

1,512.49

292,538.84

Total \$ 3,065,400.20

\$ 3,783,125.41

Net Estate to be distributed (Deduct 4 from 3)

5. Insurance paid to beneficiaries other than estate, with names of beneficiaries and amounts to each

None

Total \$ Less exemption of \$10,000 \$

(ATTACH RIDER)

6. Net value of decedent's interest in joint property

Real \$ 16,250.; Personalty \$ 4,000.; Total \$ 20,250

Cost of terminating joint tenancy (IF NOT INCLUDED ABOVE) \$ Bal. \$ 20,250.00

Total Taxable Estate \$ 3,803,375.41

7. Was interest to date of death on notes, bonds and mortgages, etc., included in inventory and appraisal? Yes

8. Is any property of decedent omitted from inventory? No Amount \$

If so, is it included above?

9. Did decedent own any real or tangible personal property situated outside this state? Yes

Value \$ 979,936.23

(See Sec. 7104 (b) FOR APPORTIONMENT OF DEDUCTIONS AND EXEMPTIONS)

10. Did decedent possess the right to exercise any power of appointment? No

Yes by irrevocable agreement

11. Did decedent give away any property before death to relatives or others?

(EXPLAIN FULLY ON RIDER, GIVING DATES, AMOUNTS, NAMES AND RELATIONSHIP OF DONEES AND MOTIVES)

12. Did decedent transfer any property during lifetime and retain either any income therefrom or any power of control over said property or income? No

(EXPLAIN FULLY ON RIDER)

State the names of the heirs or legatees, relationship to decedent, if any, estimated distributive share to each, exemption to which each is entitled, rate, and amount of tax due from each. Set forth emergency tax separately.

(IF SPACE IS INSUFFICIENT, ATTACH RIDER)

Name of Heir, Devisee or Legatee (Include Exempt Transfers)	Relationship if any	Distributive Share	Exemptions	Rate of Tax	Amount of Tax
SEE RIDER ATTACHED.					
TOTAL \$			TOTAL \$		

Oscar F. Treichler

Executor or Administrator

STATE OF WISCONSIN } ss.
County of Milwaukee }

Oscar F. Treichler

Execut. OR ~~as Administrator~~ ~~as Joint Tenant~~

being first duly sworn, on oath, deposes and says that he has read questions No. 1 to 12 inclusive of this required information, and that the answers to such questions are true to the best of his knowledge, information and belief.

Oscar F. Treichler

Execut. OR ~~as Administrator~~ ~~as Joint Tenant~~

Subscribed and sworn to before me this 13th day of February, 1947

(SEAL)

Walter C. Lemke

Notary Public, Milwaukee County, Wisconsin.

My comm. expires Mar. 2nd, 1947.

STATE OF WISCONSIN } ss.
County of Milwaukee }

A. W. Schutz

being first
duly sworn, says that on the fourth day of March, 1947, he duly deposited in the post office at Milwaukee, Wisconsin, a true copy of the within required information together with the notice of application for final settlement and to determine inheritance tax, hereto annexed, securely enclosed in an envelope, the postage prepaid thereon, addressed to each of the following named at addresses stated respectively, to-wit: John M. Niven Public Administrator, 735 N. Water St., Milwaukee 2, Wisconsin; and Department of Taxation, Madison, Wisconsin, one copy each.

A. W. Schutz

Subscribed and sworn to before me this 15th day of April, 1947

(SEAL)

Eugene M. Haertle

Notary Public, Milwaukee County, Wisconsin.
My comm. exp. Aug. 7, 1947

being first duly sworn, on oath, deposes and says that he has read questions No. 1 to 12 inclusive of the required information, and that the answers to such questions are true to the best of his knowledge, information and belief.

Oscar F. Treichler

Subscribed and sworn to before me this 13th day of February, 1947

(SEAL)

Walter C. Lemke

Notary Public, Milwaukee County, Wisconsin.

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County of Milwaukee }

A. W. Schutz

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Public Administrator,

735 N. Water St., Milwaukee, Wisconsin;

and Department of Taxation, Madison, Wisconsin, one copy each.

A. W. Schutz

Subscribed and sworn to before me this 15th day of April, 1947

(SEAL)

Eugene M. Haertle

Notary Public, Milwaukee County, Wisconsin.
My comm. exp. Aug. 7, 1947

File No. 237-023

STATE OF WISCONSIN
COUNTY COURT
MILWAUKEE COUNTY
IN PROBATE

In the Matter of the Estate of
FRED A. MILLER
Deceased.

NOTICE TO DEPARTMENT
OF TAXATION AND INFORMATION
REQUIRED BY THE
DEPARTMENT OF TAXATION

MILWAUKEE COUNTY COURT
IN PROBATE
FILED
2 Mar. 4 1947
JOHN R. JONES
Register of Probate

A. W. Schutz

Attorney

State of Wisconsin
County Court—Milwaukee County—In Probate

In the Matter of the

Estate

of

of Fred A. Miller,

Deceased.

JUDGE HANSEN.

The matter of determining the clear market value of said estate and the amount of inheritance tax to ^{9th} January, 1947 and also which the same is liable coming on to be heard on this ^{16th} day of April, 1947 ^{XX} and it appearing that due notice of such hearing was given as provided by law, and that notice in writing of such hearing was mailed to the Public Administrator of said County and to the State Department of Taxation not less than twenty days before such hearing; and due proof of the mailing of said notices having been filed herein (~~duly waived in writing by all persons interested in said matter and by the Public Administrator of said County and by the State Department of Taxation, and that such waivers have been filed herein~~);

And John M. Niven, Public Administrator appearing for and acting in behalf of said County and State of Wisconsin, and other appearances being as follows:

Oscar F. Treichler, executor, in person, and by Alex Schutz, attorney for estate; Gordon Hansen, attorney for serviceman;

And it appearing that the final account of Oscar F. Treichler,

execut~~OR~~ (~~or administrator~~) was duly filed herein; and the court (~~having appointed~~ ~~as a third appraiser to represent the County and State in determining the value of said estate, and~~ having taken testimony and considered the inventory and the report of the appraisers (~~and of said third appraiser~~), and having heard all parties desiring a hearing, and upon the whole record herein, and being fully advised in the premises:

THE COURT FINDS AND DETERMINES THAT said deceased died on the 19th day of December, 1943, ~~XX~~;

THAT the gross value of the real and personal property of such estate is as follows:

Real Estate	\$ 174,361.00
Personal Property	\$ 6,675,167.61
Widow's separate inventory and selection	\$
Life Insurance paid directly to designated beneficiaries	\$
Gifts made in contemplation of death	\$
Gifts made and intended to take effect in possession or enjoyment at or after death	\$
Joint Property	\$ 20,250.00

having been filed herein (~~only valued as existing by all persons interested in said estate and by the Public Administrators of said County and by the State Department of Taxation and that such values have been filed herein~~);

And **John M. Niven**, Public Administrator appearing for and acting in behalf of said County and State of Wisconsin, and other appearances being as follows:

Oscar F. Treichler, executor, in person, and by Alex Schutz, attorney for estate; Gordon Hansen, attorney for serviceman;

And it appearing that the final account of **Oscar F. Treichler,**

~~executor (or administrator)~~ was duly filed herein; and the court (~~having appointed a third appraiser to represent the County and State in determining the value of said estate, and~~ having taken testimony and considered the inventory and the report of the appraisers (~~and of said third appraiser~~), and having heard all parties desiring a hearing, and upon the whole record herein, and being fully advised in the premises:

THE COURT FINDS AND DETERMINES THAT said deceased died on the **19th** day of **December, 1943** ~~194~~;

THAT the gross value of the real and personal property of such estate is as follows:

Real Estate	\$ 174,361.00
Personal Property	\$ 6,675,167.61
Widow's separate inventory and selection	\$
Life Insurance paid directly to designated beneficiaries	\$
Gifts made in contemplation of death	\$
Gifts made and intended to take effect in possession or enjoyment at or after death	\$
Joint Property	\$ 20,250.00
Property discovered after inventory and appraisal filed	\$
	\$
Gross value of the estate	\$ 6,869,778.61

THAT the following deductions are allowed:

Debts or claims allowed by Court	\$
Funeral expenses	\$
Expenses of administration	\$
Federal Estate Tax	\$
Total deductions pro-rated pur. to Sec. 72.04 (8) Wis. Stats.	\$ 3,066,400.19
Clear market value of estate after deductions	\$ 3,803,378.42

THAT the names of the heirs, legatees and devisees, their relationship to deceased, the distributive share of each, the exemption to which each is entitled, the rate and amount of tax due from each, are as follows: (See reverse side.)

Names of Heirs or Legatees (Include Exempt Transfers)	Relationship if any	Distributive Shares		Exemptions	Rate of Tax	Amount of Tax	
See attached rider							
Totals (Distributive Shares and Tax)							

WHEREFORE IT IS ORDERED that the execut ~~OR~~ ~~(XXXXXXXXXXXX)~~ be and he is hereby authorized and directed to pay and deliver forthwith to the County Treasurer the sum of ****Two Hundred Eighty-six Thousand and Eight Hundred Eighty-six and 78/100 (\$286,886.78)** Dollars as and for inheritance tax to which said heirs, legatees, or devisees are liable, and to take proper receipt or receipts therefor, and to charge the same to the respective shares as taxed herein.

IT IS FURTHER ORDERED that under and pursuant to Sections 72.05 and 72.06 a discount of five per cent of said tax be allowed and deducted therefrom by the County Treasurer, provided the same is paid within one year from the accruing thereof; and that if such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of **six** per cent per annum from the said time of accrual.

IT IS FURTHER ORDERED that a copy of this order be forthwith delivered or mailed to each the County Treasurer, the State Treasurer, and the State Department of Taxation.

Dated **January 30, 1948** ~~xx~~

BY THE COURT

(SEAL)

C O P Y

C. A. HANSEN

(In duplicate)

County Judge.

13
WISCONSIN
Y COURT
EE COUNTY
OBATE
Estate
of
iller
Deceased.
TERMINING
ANCE TAX
of
EE COUNTY COURT
PROBATE
L E D
30 1948 2
t. JONES
r of Probate
326
252
r St.
orney for Estate.

Totals (Distributive Shares and Tax)

WHEREFORE IT IS ORDERED that the sum of ~~ONE HUNDRED DOLLARS~~ be and he is hereby authorized and directed to pay and deliver forthwith to the County Treasurer the sum of **Two Hundred Eighty-six Thousand and Eight Hundred Eighty-six and 78/100 (\$286,886.78)** Dollars

as and for inheritance tax to which said heirs, legatees, or devisees are liable, and to take proper receipt or receipts therefor, and to charge the same to the respective shares as taxed herein.

IT IS FURTHER ORDERED that under and pursuant to Sections 72.05 and 72.06 a discount of five per cent of said tax be allowed and deducted therefrom by the County Treasurer, provided the same is paid within one year from the accruing thereof; and that if such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of **six** per cent per annum from the said time of accrual.

IT IS FURTHER ORDERED that a copy of this order be forthwith delivered or mailed to each the County Treasurer, the State Treasurer, and the State Department of Taxation.

Dated **January 30, 1948** xx

BY THE COURT

(SEAL)

C O P Y C. A. HANSEN

(In duplicate)

County Judge

File No. 237 023

STATE OF WISCONSIN
COUNTY COURT
MILWAUKEE COUNTY
IN PROBATE

In the Matter of the Estate
of

Fred A. Miller
Deceased.

ORDER DETERMINING
INHERITANCE TAX

Recorded in Vol. _____
Page _____ of _____

MILWAUKEE COUNTY COURT
IN PROBATE
F I L E D
2 Jan 30 1948 2
JOHN R. JONES
Register of Probate

Alex Schutz,
735 N. Water St.

Attorney for Estate.

(Note) The above sum does not include the Wisconsin Estate Tax Under Sections 72.50 to 72.61 of the Wisconsin Statutes. For such estate tax see Rider II hereto attached.

May Frances Miller

Wife \$100,000.00 (1 nuptial agreement
not taxable)

May Frances Miller

Wife 406,607.37 15,000.00 2% \$ 200.00
4 1000.00
6 3000.00
8 24528.59

total Nor. tax... 28728.59

30% 8618.56

Total N. & Emgcy tax. \$37347.17 *

Elise K. John

Sister 282.37 2,000.00 - None

Emma Gross

Cousin 1,000.00 250.00 6% \$ 45.00
30% 13.50
58.50 *

Fred Engelhardt

Cousin 1,000.00 250.00 6% \$ 45.00
30% 13.50
58.50 *

Phyllis Engelhardt

Cousin 5,000.00 250.00 6% \$ 285.00
30% 85.50
370.50 *

Angie Engelhardt

Cousin 3,000.00 250.00 6% \$ 165.00
30% 49.50
214.50 *

Hugo Meyer

Cousin 1,000.00 250.00 6% \$ 45.00
30% 13.50
58.50 *

Oscar Treichler

Stranger 10,000.00 100.00 8% \$ 792.00
30% 237.60
1029.60 *

C. J. Reynolds

Stranger 5,000.00 100.00 8% \$ 392.00
30% 117.60
509.60 *St. Francis Seminary
(St. Francis, Wis.)

Relig. 25,000.00 all - None

Little Sisters of the Poor
(Milwaukee, Wis.)

Char. 2,000.00 all - None

Sisters of Good Shepherd
(Milwaukee, Wis.)

Char. 1,000.00 all - None

Milwaukee Children's Hospital

Char. 1,000.00 all - None

St. Joseph's Hospital
(Milwaukee, Wis.)

Char. 4,000.00 all - None

Phyllis Engelhardt	Cousin	5,000.00	250.00	6% 30%	\$ 285.00 85.50 \$ 370.50 *
Angie Engelhardt	Cousin	3,000.00	250.00	6% 30%	\$ 165.00 49.50 \$ 214.50 *
Hugo Meyer	Cousin	1,000.00	250.00	6% 30%	\$ 45.00 13.50 \$ 58.50 *
Oscar Treichler	Stranger	10,000.00	100.00	8% 30%	\$ 792.00 237.60 \$ 1029.60 *
C. J. Reynolds	Stranger	5,000.00	100.00	8% 30%	\$ 392.00 117.60 \$ 509.60 *
St. Francis Seminary (St. Francis, Wis.)	Relig.	25,000.00	all	-	None
Little Sisters of the Poor (Milwaukee, Wis.)	Char.	2,000.00	all	-	None
Sisters of Good Shepherd (Milwaukee, Wis.)	Char.	1,000.00	all	-	None
Milwaukee Children's Hospital	Char.	1,000.00	all	-	None
St. Joseph's Hospital (Milwaukee, Wis.)	Char.	4,000.00	all	-	None
St. Aemilian's Orphan Asy. (Milwaukee, Wis.)	Char.	2,000.00	all	-	None
St. Vincent's Orphan Asy. (Milwaukee, Wis.)	Char.	1,000.00	all	-	None
St. Sebastian's Roman Cath. Church, Milw. Wis.	Relig.	5,000.00	all	-	None
St. Benedict de Moor Mission (Milwaukee, Wis.)	Relig.	1,000.00	all	-	None
St. Charles Boy's Home, (Milwaukee, Wis.)	Char.	2,000.00	all	-	None
Milwaukee Cath. Home for Aged,	Char.	2,000.00	all	-	None
St. Margaret's Guild, Milw.	Relig.	1,000.00	all	-	None

St. Vincent de Paul Soc (Milwaukee, Wis.)	Char.	\$ 5,000.00	all		None
Roman Cath. Archdiocese of Milwaukee	Per.Care	3,000.00	500.00	8 30%	\$200.00 60.00 \$260.00 *
The Fathers at Holy Hill, Hartford, Wis.	Masses	500.00	all	-	None
Commissariat of the Holy Land of America.	Masses	500.00	all	-	None
Missionary Ass'n of Cath. Women(for use in State of Wisconsin)	Relig.	\$350,000.00	all	-	None
The Jesuit Seminary Aid Ass'n. of Gesù Church, Milw.	Relig.	\$350,000.00	all	-	None
Frederick C. Miller	Nephew	\$124,957.38	1,700.00*	2% 4 6 8 30%	\$466.00 1000.00 3000.00 1996.59 \$6462.59 1938.78 \$8401.37*
Loretta Kopmeier	Niece	\$124,957.38	1,700.00*	(2-4-6-8% & 30%)	\$8401.37*
Marguerite Bransfield	Niece	\$124,957.39	1,700.00*	(2-4-6-8 & 30%)	\$8401.37*
Claire McCahey	Niece	\$124,957.39	1,700.00*	(2-4-6-8% & 30%)	\$8401.37 *
Charlotte E. Blommer	Niece	\$124,957.39	1,700.00*	(2-4-6-8% & 30%)	\$8401.37 *
Charles M. Bransfield	Gr.nephew	\$124,957.39	1,700.00*	(2-4-6-8% & 30%)	\$8401.37 *
Harry G. John, Jr.	Nephew	\$1,354,872.18	1,700.00*	2% 4 6 8 10 30%	\$ 466.00 1000.00 3000.00 32000.00 85487.22 121953.22 36585.97 \$158539.19 *

2 3000.00
 6 3000.00
 8 1996.59
 10 6462.59
 30% 1938.78
 \$8401.37*

Loretta Kopmeier	Niece	\$124,957.38	1,700.00*	(2-4-6-8% & 30%)	\$8401.37*
Marguerite Bransfield	Niece	\$124,957.39	1,700.00*	(2-4-6-8 & 30%)	\$8401.37*
Claire McCahey	Niece	\$124,957.39	1,700.00*	(2-4-6-8% & 30%)	\$8401.37 *
Charlotte E. Blommer	Niece	\$124,957.39	1,700.00*	(2-4-6-8% & 30%)	\$8401.37 *
Charles M. Bransfield	Gr.nephew	\$124,957.39	1,700.00*	(2-4-6-8% & 30%)	\$8401.37 *
Harry G. John, Jr.	Nephew	\$1,354,872.18	1,700.00*	(2-4-6-8-10% & 30%) see opposite)	2% \$ 466.00 4 1000.00 6 3000.00 8 32000.00 10 85487.22 121953.22 30% 36585.97 \$158539.19 *

Lorraine Elise John Mulberger	Niece	\$409,872.18	1,700.00*	2% \$ 466.00 4 1000.00 6 3000.00 8 24789.77 29255.77 30% 8776.73 38032.50 *
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(1,700.00* exemptions pro-rated pur. to Sec. 72.04 (8) Wis.Stats.)

TOTALS	\$3,803,378.42	\$286,886.78 *
--------	----------------	----------------

Nor. tax	\$220,682.12
Emgcy	66,204.66
	\$286,886.78 *

Tax tenders as follows: \$374,613.46 on Dec. 18, 1944
 130,000.00 on Feb. 18, 1946
 107,867.78 on Mar. 12, 1945
 32,726.81 on Feb. 11, 1947

[fol. 13]

II

It Is Further Ordered and Determined that this estate is subject to the estate tax imposed by Sections 72.50 to 72.61 of the Wisconsin Statutes and that said tax is computed as follows:

80% of Federal Estate Tax under the U. S.	
Revenue Act of 1926	\$630,709.62
Wisconsin Inheritance Tax	
Normal	\$220,682.12
Wisconsin Inheritance Tax	
30% Surtax	\$66,204.66
Illinois Inheritance Tax	\$35,616.26
Florida Estate Tax	\$21,709.45
Total Contra Items	\$344,212.49
Wisconsin Estate Tax	\$286,497.13
30% Surtax	\$85,949.14
Total Wisconsin Estate Tax and Sur-	
tax Thereon	\$372,446.27

Wherefore it Is Ordered, that the executor be and hereby is authorized and directed to pay and deliver forthwith to the County Treasurer the sum of Three Hundred Seventy-two Thousand Four Hundred Forty-six and 27/100 Dollars (\$372,446.27), as and for the Wisconsin Estate Tax herein and surtax thereon.

It Is Further Ordered that this tax is payable at the time and in the manner provided by the pertinent provisions of Sections 72.50 to 72.61 and of 72.74 of the Wisconsin Statutes and shall bear interest, if any, as therein provided.

This tax is additional to the Normal Wisconsin Inheritance Tax and the 30% Surtax thereon.

Dated January 30, 1948.

By the Court, (Copy) (S.) C. A. Hansen, County Judge. (In Duplicate.) (Seal.)

[fol. 14] IN COUNTY COURT OF MILWAUKEE COUNTY

In Probate

≡237-023

In the Matter of the Last Will and Testament of FRED A.
MILLER, Deceased

DECISION—January 15, 1948

The question for the Court to decide in the above entitled case is whether the thirty per cent Emergency Tax levied by *Section 72.74 Wisconsin Statutes* is measured by computing 30% of the normal inheritance tax, or whether it must be computed upon the "Estate Tax" created by *Sections 72.50 to 72.61*, where such sections are applicable.

The Court is of the opinion that *Sections 72.50 to 72.61* were enacted for the purpose of diverting from the Federal Government to the State Government the amount of the difference between the tax imposed by the State Inheritance Tax Law and the deduction allowed by the Federal Government without increasing the total taxes payable by the taxpayer.

This purpose and intent is clearly stated in *Section 72.50* which provides as follows:

"72.56 Intent of Sections 72.50 to 72.61. It is hereby declared to be the intent and purpose of sections 72.50 to 72.61 to obtain for this state the benefit of the credit allowed under the provisions of said United States revenue act, to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes *and the same shall be liberally construed to effect this purpose.* (1931 c. 426)" Note: Italics by the Court.

[fol. 15] The Court is therefore of the opinion that in computing the Wisconsin Estate Tax, the surtax on the normal inheritance tax, being an additional transfer tax, must be deducted from the Federal eighty per cent credit. Otherwise, the provisions of *Sections 72.50 to 72.61* would not accomplish the purpose for which they were created; namely, to permit the entire deduction authorized by the Federal Estate Tax Statute without increasing the total taxes payable by the taxpayer.

Let an order in conformity with this decision be drafted by the attorney for the executor and presented to the Court for signature.

Dated at Milwaukee, Wisconsin, this 15th day of January, 1948.

By the Court, C. A. Hansen, County Judge.

[fol. 16] IN SUPREME COURT OF WISCONSIN

[Title omitted]

STIPULATION RE RECORD AND BILL OF EXCEPTIONS

.

[fols. 17-25] It is further stipulated and agreed that the net federal estate tax assessed by the United States Commissioner of Internal Revenue against the estate of the decedent was in the sum of \$3,076,131.19, inclusive of the 80% credit for state taxes under the U. S. Revenue Act of 1926 in the sum of \$630,709.62.

Dated this 17th day of March, 1948.

(S.) A. W. Schutz, Attorney for Executor. (S.) Neil Conway, Inheritance Tax Counsel. (S.) John M. Niven, Public Administrator.

[fols. 26-27] IN SUPREME COURT OF WISCONSIN

Milwaukee County Court

Opinion by Justice Hughes

In the Matter of the ESTATE OF FRED A. MILLER, Deceased

STATE OF WISCONSIN, Appellant,

vs.

OSCAR F. TREICHLER, Executor, Respondent

JUDGMENT—December 15, 1948

This cause came on to be heard on appeal from the order of the County Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here or-

dered and adjudged by this Court, that the order of the County Court of Milwaukee County, appealed from in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said County Court with instructions to enter an order determining the tax in accordance with the State's computation.

Justices Martin and Broadfoot took no part.

[fol. 28] IN SUPREME COURT OF WISCONSIN, AUGUST TERM,
1948

No. 43

IN RE ESTATE OF FRED A. MILLER, Dec'd:

STATE OF WISCONSIN, Appellant,

v.

OSCAR F. TREICHLER, Ex'r., Respondent

Appeal from an Order of the County Court of Milwaukee County: C. A. Hansen, Judge. *Reversed*

The will of Fred A. Miller, deceased, was duly probated in the county court of Milwaukee county. The estate was subject to death taxes imposed by the federal government, and after allowance of all deductions there was a net estate of \$3,803,378.42 subject to Wisconsin inheritance taxes. From an order determining the Wisconsin inheritance taxes payable, the State of Wisconsin appeals.

OPINION

[fol. 29] HUGHES, J.:

The case requires a determination of the proper application of sec. 72.74, Wis. Stats. which imposes an additional emergency tax. The principal conflict between the State and the taxpayer arises from the question of whether in computing the amount due under sec. 72.50 the amount imposed by sec. 72.74 must be deducted from the federal credit allowed to the taxpayer for taxes paid the state.

The second contention of the taxpayer is that if the total Wisconsin tax should be so computed as to exceed the maxi-

imum federal credit allowed to said taxpayer, then it is unconstitutional.

Fred A. Miller died December 19, 1943, a resident of Milwaukee county. He left a gross estate of \$6,869,778.61. Of his total property there was real and tangible personal property of the value of \$979,936.23 located in the states of Illinois and Florida. The rest of his property was in Wisconsin. Because of the value of the estate there was a federal death tax imposed in the amount of \$788,387.02.

The federal government allows credit to the taxpayer for taxes paid to all states, not, however, to exceed eighty per cent of the total imposed. The eighty per cent of federal estate tax credit available in this case was, therefore, \$630,709.62.

The first question which must be determined is whether this was intended as a ceiling beyond which states are not to be permitted to tax.

The purpose of the federal enactment appears to have been to protect states which theretofore had imposed estate taxes against the removal of wealthy citizens to states having no tax or a smaller tax.

[fol. 30] Sec. 813 (b) of the Internal Revenue Code provides:

"The tax imposed by section 810 or 860 shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia for any possession of the United States, in respect of any property included in the gross estate . . . The credit allowed by this subsection shall not exceed 80 per centum of the tax imposed by section 810 or 860 . . ."

If the entire estate lay within Wisconsin, the legislature could certainly tax beyond the death tax limits fixed by Congress as a minimum.) It may be that an increase of thirty per cent will induce wealth to move from Wisconsin and thus in some instances defeat its own purpose as well as lose for the state the right to recapture the federal credit. This is, however, a matter for legislative concern, not judicial.

Secs. 72.01 to 72.24 Wis. Stats. impose the "normal" inheritance taxes. There is no question raised as to the validity of these provisions nor that, properly computed

upon that portion of the Miller estate taxable in Wisconsin, the amount due the state therefor is \$220,682.12. There was paid to Illinois for taxes \$35,616.26, and to Florida \$21,709.45.

Sec. 72.50, Wis. State, provides:

"In addition to the taxes imposed by sections 72.01 to 72.24, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the United States revenue act of 1926, and amendments thereto, where the decedent at the time of his decease was a resident of this state. The amount of said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding eighty per cent, allowable under said United States revenue act, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of the estate of the decedent had sections 72.50 to 72.61 not been enacted"

[fol. 31] It is contended that since sec. 72.50, Stats., provides that the estate tax shall be such sum as the federal credit allowable shall exceed the aggregate of all estate, inheritance, transfer, legacy and succession taxes, and that since sec. 72.74 (2) imposes an emergency tax which is a form of inheritance tax, it, too, must be deducted in computing the amount due under sec. 72.50. Such deduction would render sec. 72.74 a nullity. It is apparent that the exemptions included in sec. 72.50 were of the then existing estate and inheritance taxes, and were not intended as a bar to future legislation increasing the amount of state inheritance taxes. A reading of the statutes in the order of their enactment indicates an intention to impose by sec. 72.74 an additional tax after deduction of all taxes previously allowed by sec. 72.50.

The State's method of computation is:

TABLE A

(1) Wisconsin Normal Inherit. Taxes		\$220,682 12
(2) Wisconsin Estate Tax:		
80% of U. S. Estate Tax		\$630,709 62
Less: (a) Wis. Normal Taxes (1)	\$220,682 12	
(b) Ill. Inherit. Taxes	35,616 26	
(c) Fla. Inherit. Taxes	21,709 45	
Total State Taxes		278,007 83
Difference		352,701 79
(3) Wisconsin Emergency Tax:		
Wis. Normal Taxes (1)	220,682 12	
Wis. Estate Tax (2)	352,701 79	
Total		573,383 91
30% Additional Tax		172,015 20
Total Wisconsin Inheritance Taxes		\$745,399 11

[fol. 32] The respondent's method of computation is:

TABLE B

80% Federal Credit		\$630,709 62
Deduct:		
Wisconsin Normal Inherit. Tax	\$220,682 12	
30% Wisconsin Inherit. Surtax	66,204 66	
Illinois Inherit. Tax	35,616 26	
Florida Estate Tax	21,709 45	
Total deductions		344,212 49
Difference between Federal Credit and aggregate Wisconsin Inheritance Taxes and death duties paid Illinois and Florida		286,497 13
Wisconsin Estate tax (above difference + 13)		220,382 41
Wisconsin Estate Surtax (balance of above difference, i. e. 3 of Wisconsin Estate Tax)		66,114 72
Total Wisconsin Estate Taxes		286,497 13

The material provisions of the emergency tax law are:

Sec. 72.74 (2) "In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61, an emergency tax for relief purposes, rehabilitation of returning veterans of World War II, construction and improvements at state institutions and other state property and for post-war public works projects to relieve post-war unemployment is hereby imposed upon all transfers of property which are taxable under the provisions of said sections and which are made subsequent to March 27, 1935 and prior to July 1, 1949 which said tax

shall be equal to 30 per cent of the tax imposed by said sections.

It will be noted that if sec. 72.74 had never been enacted, the normal tax of \$220,682.12, plus the Illinois inheritance tax of \$35,616.26 and the Florida inheritance tax of \$21,709.43, would aggregate \$278,007.83, which, when deducted [fol. 33] from the federal credit of \$630,709.62 as provided by sec. 72.74, would yield an estate tax of \$352,701.79, or a total, with the normal tax (\$220,682.12) of \$573,383.91. If we follow the taxpayer's computation on Table B, we arrive at the same total:

Normal tax	\$220,682.12
30% on Normal	66,204.66
Wis. Estate Tax	220,382.41
30% on Estate Tax	66,114.72
Total	\$573,383.91

The trial court allowed the taxpayer to deduct the normal tax plus the thirty per cent emergency tax figured on the normal. This yielded an estate tax of \$286,497.13, and the court allowed the ~~thirty per cent thereon in addition~~. This followed neither the method contended for by the State nor that of the taxpayer, and produced a compromise order which is entirely indefensible.

Respondent contends that it is the court's duty to so construe the statute as to make it constitutional. We are of the opinion that it is the first duty of the court to give effect to the law as passed if the purpose is lawful.

The purpose of tax laws is primarily to produce revenue for the state. Certainly that was the purpose of the legislature when it enacted the emergency tax. If one interpretation gives the law effect and the other renders it a nullity, the one giving it effect is more reasonable and must be adopted, unless to do so violates the taxpayer's constitutional guarantees.

Respondent contends that the construction sought by the State renders the law unconstitutional because, as computed by the department of taxation, the Wisconsin taxes are imposed on property in Florida and Illinois as well as on property within this state. If that be true, then it is un-

[fol. 34] constitutional. *Frick v. Pennsylvania* (1925), 268 U. S. 473, 494, 495, 96 L. Ed. 1058, 45 Sup. Ct. 603, 606.

We are of the opinion that there is no such question presented on the facts in this case. While it is true that the estate tax is imposed in a "catch-all" manner by absorbing eighty per cent of the federal death tax, it is apparent that more than eighty per cent of the gross estate of Mr. Miller was within Wisconsin and therefore subject to taxation by this state.

It is argued by counsel for respondent and *amici curiae* that situations might arise where such portion of the estate lay outside Wisconsin that to levy a tax under sec. 72.74, Stats. at all would be to tax property beyond the state. It would seem patent that in imposing the emergency tax, as in imposing the normal tax, care must be used to avoid taxing property beyond the jurisdiction of this state. However, we need make no further effort in pursuit of such speculation. We are met with no such situation here, since eighty-six per cent of the property belonging to the Miller estate was located in Wisconsin and the emergency tax imposed under the State's computation is upon something less than eighty per cent of the total federal taxes. As applied to the facts of this case, therefore, the computation does not constitute an attempt to levy a tax upon nor to measure a tax by property having a situs outside of Wisconsin, and must be held to be valid.

By the Court.—Order reversed and cause remanded with instructions to enter an order determining the tax in accordance with the State's computation.

[fol. 35] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL.—Filed January 40,
1949

To the Honorable the Supreme Court of the State of Wisconsin:

Now comes petitioner, Oscar F. Treichler, Executor, the above named respondent, by A. W. Schutz, his attorney, and respectfully shows that on the 15th day of December, A. D.

1948, the Court, upon an appeal had and taken from the County Court of Milwaukee County from a judgment of the last named Court in favor of the above named respondent and against the above named appellant, reversed the judgment of said County Court of Milwaukee County on the appeal of the appellant and denied the contention of the respondent on its cross-appeal by notice of review, under Section 274.12 of the Wisconsin Statutes, raising the federal question which is the subject of this petition and which judgment of the Supreme Court of the State of Wisconsin was a final judgment entered on said 15th day of December, 1948, against your petitioner, the above named respondent and in favor of the above named appellant, State of Wisconsin, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of said respondent, all of which will more in detail appear from the assignment of errors which is filed with this petition:

Wherefore, your petitioner prays that an appeal may be allowed in this behalf to the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

A. W. Schutz, Attorney for Petitioner and Respondent above Named.

ORDER ALLOWING APPEAL

Appeal allowed this 10th day of January, A. D. 1948, and bond for costs fixed at five hundred and no Dollars.

Marvin B. Rosenberry, Chief Justice, Supreme Court of the State of Wisconsin. (Imp. Seal.)

[fol. 37]

[File endorsement omitted]

[Title omitted]

IN SUPREME COURT OF WISCONSIN

ASSIGNMENT OF ERRORS—Filed January 10, 1949

The appellant, Oscar F. Treichler, Executor, in connection with his petition for the allowance of an appeal to the Supreme Court of the United States, makes the follow-

ing assignment of errors which he avers occurred on the hearing hereof and upon which he relies to reverse the judgment herein as appears of record. The following preliminary statement is requisite to an understanding of the errors hereinafter assigned.

The State of Wisconsin, under and by virtue of Chapter 72 of the Wisconsin Statutes, as construed by the decision of the Supreme Court of Wisconsin, from which this appeal is had and taken, so far as relevant, levies the following death duties:

(a) a normal inheritance tax imposed upon the transfers of property of a decedent by reason of his death; (Sec. 72.01 to 72.24 Wis. Stats.)

[fol. 38] (b) an estate tax levied upon the estate of the decedent as a whole measured by the difference between the normal inheritance tax above mentioned, plus death duties levied by other states and the credit allowable under the United States Revenue Act of 1926 for inheritance and estate taxes paid to the several states of the United States; (Sec. 72.50 to 72.61 Wis. Stats.)

(c) an emergency death duty of 30% of the combined normal inheritance tax and Wisconsin estate tax mentioned in clauses (a) and (b). (Sec. 72.74 Wis. Stats.)

The decedent left a gross estate having a taxable situs in the State of Wisconsin in the sum of \$6,869,778.61 and real and tangible personal property of the value of \$979,936.23 located in the States of Illinois and Florida. The 80% federal tax credit allowable as for taxes paid to the several states was in the amount of \$630,709.62.

The appellant assigns as error:

1. That the Wisconsin Supreme Court erred in holding that Section 72.74 Wis. Stats. imposing the emergency tax mentioned in clause (c) above, as construed and by it applied herein, was not in contravention of the due process clause of the 14th Amendment of the Constitution of the United States, as construed by the Supreme Court of the United States in *Frick v. Pennsylvania* (1925), 268 U. S. 473, 494, 495;

2. That the Wisconsin Supreme Court held it to be without significance, that Section 72.74 Wis. Stats., as construed and applied by it herein, makes no provisions for

the proration of the emergency tax as between property having a taxable situs in the State of Wisconsin and property having a taxable situs in other states;

Wherefore, the appellant, Oscar F. Treichler, Executor, prays that the judgment of the Supreme Court of Wisconsin be reversed and the challenge of the said appellant to the validity of Section 72.74 of the Wisconsin Statutes be sustained.

A. W. Schutz, Attorney for Appellant, Oscar F. Treichler, Executor.

[fol. 49] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PARTS OF RECORD THOUGHT NECESSARY FOR CONSIDERATION THEREOF, PURSUANT TO RULE 13, PARAGRAPH 9 OF THE RULES—Filed February 7, 1949

Appellant intends to rely upon the following points:

That the Wisconsin Supreme Court erred in holding that Section 72.74 Wis. Stats. imposing the emergency tax mentioned in sub-section (2) thereof, as construed and by it applied herein, was not in contravention of the due process clause of the 14th Amendment of the Constitution of the United States, as construed by the Supreme Court of the United States in *Frick v. Pennsylvania* (1925), 268 U. S. 473, 494, 495, in that the Wisconsin Supreme Court held it to be without significance that Section 72.74 Wis. Stats. imposing the 30% emergency death duty makes no provision for the proration of said emergency tax as between property of the decedent having a taxable situs in the State of Wisconsin and real and tangible personal property of the decedent having a taxable situs in other states and measures [fol. 50] the tax by the aggregate of such property, both within and without the State of Wisconsin.

The appellant therefore designates the following parts of the record by him thought necessary for the consideration of the points hereinbefore stated:

1. Pages 69 and 70 of the Record, entitled "Notice to Department of Taxation and Information Required by the Department of Taxation."

2. Page 87 of the Record, being material part of item of Record entitled "Order Determining Inheritance Tax" entered in the County Court of Milwaukee County.

3. That part of page 90 of the Record, reciting as follows:

"It is further stipulated and agreed that the net federal estate tax assessed by the United States Commissioner of Internal Revenue against the estate of the decedent was in the sum of \$3,076,131.19, inclusive of the 80% credit for state taxes under the U. S. Revenue Act of 1926 in the sum of \$630,709.62."

4. Opinion and Judgment of the Supreme Court of the State of Wisconsin rendered December 15, 1948.

5. Assignment of Errors.

Respectfully submitted, A. W. Schutz, Attorney for Appellant, Executor.

[fol. 51]

ADMISSION OF SERVICE

Service of Statement of Points on which Appellant Intends to Rely and Designation of Parts of Record Thought Necessary for Consideration Thereof, Pursuant to Rule 13, Paragraph 9 of the Rules, in the above-entitled cause, is hereby admitted this 17th day of January, 1949.

Thomas E. Fairchild, Attorney General of Wisconsin, Attorney for Appellee, by Harold H. Persons, Assistant Attorney General.

[fol. 51a] [File endorsement omitted.]

[fol. 52] SUPREME COURT OF THE UNITED STATES

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF RECORD
/ To Be Printed—Filed January 27, 1949

Comes now the State of Wisconsin, the Appellee in the above entitled cause, and states that, in addition to the parts of the record designated by the Appellant, the follow-

ing are material and necessary to be printed for the hearing of the case:

<i>Title of Paper</i>	<i>Record Page</i>
Page 1 of Order Determining Inheritance Taxes	83
Pages 1 to 3 inclusive of Rider to Order Determining Inheritance Taxes	84, 85 and 86

Thomas E. Fairchild, Attorney General of Wisconsin; Harold H. Persons, Assistant Attorney General of Wisconsin, Counsel for Appellees

Personal service of the foregoing Appellee's Statement of Additional Parts of the Record to be Printed on the 20th day of January, 1949 is hereby admitted.

A. W. Schutz, Counsel for Appellant

[fol. 52a] [File endorsement omitted.]

[fol. 53] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

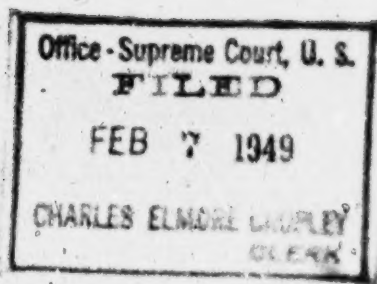
No. 547

ORDER NOTING PROBABLE JURISDICTION—March 14, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: File No. 53549. Wisconsin Supreme Court, Term No. 547. Oscar F. Treichler, Executor of the Estate of Fred A. Miller, Appellant, vs. State of Wisconsin. Filed February 7, 1949. Term No. 547, O. T. 1948.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, ~~1948~~ 1949

No. ~~517~~ 20

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF
FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT AS TO JURISDICTION

A. W. SCHUTZ,
Counsel for Appellant.

INDEX

SUBJECT INDEX

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	2
State statute the validity of which is involved	2
Dates of the judgment and application for appeal	2
Nature of the case and rulings below	6
Appendix "A"—Opinion of the Supreme Court of Wisconsin	8
Appendix "B"—Decision of Probate Court of Milwaukee County	14

TABLE OF CASES CITED

<i>Frick v. Pennsylvania</i> , 268 U. S. 473	2, 4, 5
--	---------

STATUTES CITED

Constitution of the United States, 14th Amendment	2, 4
United States Code:	
Title 26, Section 811	4
Title 28, Section 1257(2)	2
Wisconsin Statutes:	
Section 72.74	2, 4
Section 274.12	1

IN SUPREME COURT, STATE OF WISCONSIN

AUGUST TERM, 1948

No. 43

IN RE WILL OF FRED A. MILLER,

Deceased

STATE OF WISCONSIN,

Appellant

vs.

OSCAR F. TREICHLER, EXECUTOR,

Respondent

JURISDICTIONAL STATEMENT UNDER AND PURSUANT TO RULE 12, PARAGRAPH 1, OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

(a) This is an appeal to the Supreme Court of the United States from a final judgment of the Supreme Court of the State of Wisconsin reversing an order of the County Court of Milwaukee County determining the death duties payable in respect of the estate of the above named decedent, wherein the State appealed from the tax determination of the lower court and the executor above named filed a notice of review under state practice (Sec. 274.12 Wis.

Stats.) averring the invalidity of one of the statutes levying death duties, to-wit: Section 72.74 Wis. Stats., as construed and computed by the Wisconsin Department of Taxation, on the ground that it was repugnant to the due process clause of the 14th Amendment to the Constitution of the United States, as construed by the Supreme Court of the United States in *Frick v. Pennsylvania* (1925), 268 U. S. 473, 494, 495. The State Supreme Court adopted the construction of said Section 72.74 and the computation of the death duties as contended for by the Wisconsin Department of Taxation and upheld the validity of the statute aforesaid as construed and applied by it. The federal statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257 clause (2), Title 28 of the United States Code.

(b) The Statute of the State of Wisconsin, the validity of which is involved, so far as pertinent to this appeal, is Section 72.74 (2) Wis. Stats. of 1943, foot of p. 1177 and head of p. 1178. It reads as follows:

"72.74 *Emergency tax on inheritances.* (2) In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61 of the statutes, an emergency tax for relief purposes, rehabilitation of returning veterans of World War II, construction and improvements at state institutions and other state property and for post-war public works projects to relieve post-war unemployment is hereby imposed upon all transfers of property which are taxable under the provisions of said sections and which are made subsequent to March 27, 1935 and prior to July 1, 1945 which said tax shall be equal to 30 per cent of the tax imposed by said sections."

(c) The date of the judgment of the Supreme Court of the State of Wisconsin sought to be reviewed is December 15, 1948, and the date upon which the application for appeal was presented is January 10, 1949.

The decedent died testate, a resident of the County of Milwaukee, Wisconsin, December 19, 1943. (R. 83) He left a gross estate having a taxable situs in the State of Wisconsin of \$6,869,778.61 and a gross estate consisting of real and tangible personal property having a taxable situs in the States of Illinois and Florida of \$979,936.23. (R. 83, R. 69) The net federal estate taxes assessed by the United States Commissioner of Internal Revenue against the estate of the decedent was in the sum of \$3,076,131.19, inclusive of the 80% credit for state death duties under the United States Revenue Act of 1926, in the sum of \$630,709.62. (R. 89) The normal Wisconsin inheritance tax was in the sum of \$220,682.12 (R. 87). The Illinois inheritance tax was in the sum of \$35,616.25 (R. 87). The Florida estate tax was in the sum of \$21,709.45 (R. 87).

The State of Wisconsin, under and by virtue of Chapter 72 of the Wisconsin Statutes, as construed by the decision of the Supreme Court of Wisconsin, from which this appeal is had and taken, so far as relevant, levies the following death duties:

(a) a normal inheritance tax imposed upon the transferees of property of a decedent by reason of his death; (Sec. 72.01 to 72.24 Wis. Stats.)

(b) an estate tax levied upon the estate of the decedent as a whole measured by the difference between the normal inheritance tax above mentioned, (plus death duties, if any, levied by other states) and the credit allowable under the United States Revenue Act of 1926 for inheritance and estate taxes paid to the several states of the United States; (Sec. 72.50 to 72.61 Wis. Stats.)

(c) an emergency death duty of 30% of the combined normal inheritance tax and Wisconsin estate tax mentioned in clauses (a) and (b) (Sec. 72.74 Wis. Stats.)

The County Court of Milwaukee County, by its order determining the Wisconsin death duties, assessed the 30% emergency tax laid by Section 72.74 Wis. Stats. on the Wisconsin estate tax as computed by it. When the State of Wisconsin appealed from the order determining the death duties payable in respect of this estate, the appellant, executor, served a Notice of Review permissible under state practice as aforesaid, challenging the constitutionality of Section 72.74 Wis. Stats. on the ground that it necessarily operated to measure the tax imposed thereby upon property beyond the taxable situs of the State of Wisconsin, to-wit: Illinois and Florida, in contravention of the 14th Amendment to the Constitution of the United States as construed in *Frick v. Pennsylvania* (1925), 268 U. S. 473, 494, 495. (R. 92, pp. 10, 11, 12, 13 and 14 of Respondent's Brief in the State Supreme Court under head entitled "Argument in Support of Respondent's contention with Respect to the Second Question") This was argued to be so because the Wisconsin estate tax is in turn directly measured by the federal tax credit and the federal tax is levied upon property both within and without the taxable jurisdiction of the State of Wisconsin. 26 U. S. Code, Sec. 811.

The State Supreme Court, in its opinion upon the federal constitutional question so raised, passed upon it at the foot of page 6 and the head of page 7 of its opinion, as follows:

"Respondent contends that the construction sought by the State renders the law unconstitutional because as computed by the department of taxation, the Wisconsin taxes are imposed on property in Florida and Illinois as well as property within this state. If that be true, then it is unconstitutional. *Frick v. Pennsylvania* (1925), 268 U. S. 473, 494, 495, 69 L. Ed. 1058, 45 Sup. Ct. 603, 606.

"We are of the opinion that there is no such question presented on the facts in this case. While it is true that the estate tax is imposed in a 'catch-all' manner

by absorbing eighty per cent of the federal death tax, it is apparent that more than eighty per cent of the gross estate of Mr. Miller was within Wisconsin and therefore subject to taxation by this state."

On page 4 of the opinion of the State Supreme Court will appear the manner in which the Wisconsin 30% emergency tax has been construed and applied in this case, under step (3), sub-head "Wisconsin Emergency Tax" of "Table A" appearing on that page, to-wit:

"Wis. Normal Taxes (1)	220,682 12	
Wis. Estate Tax (2)	352,701 79	
Total	573,383 91	
30% Additional Tax		172,015 20

It will be observed that under this construction and method of computation, the 30% emergency death duty, laid by Section 72.74 Wis Stats., is always exactly 30% of the federal credit and therefore 24% of the federal 1926 basic tax, i. e. 30% of 80%, (reduced by 30% of death duties, if any, levied by other states) as shown by the illustrations of the operation and effect of the tax as hereinafter noted. The conclusion would appear to be inescapable that the 30% emergency death duty so laid by Wisconsin is directly geared to the federal tax, which, in turn, is based, as before stated, upon property both within and without the taxable jurisdiction of Wisconsin. That a substantial federal question thus arises appears to be manifest in the light of the holding of the Supreme Court of the United States in *Frick v. Pennsylvania* (1925), 268 U. S. 473, 494, 495, *supra*. The doctrine of this case, first announced in 1925, has ever since been consistently followed by the latter Court in the field of inheritance taxation and is one of the landmarks of the law of inheritance taxation in the United States.

In that case, the State of Pennsylvania, the state of decedent's domicile, sought to measure its inheritance tax in part on tangible personal property located in New York and

The County Court of Milwaukee County, by its order determining the Wisconsin death duties, assessed the 30% emergency tax laid by Section 72.74 Wis. Stats. on the Wisconsin estate tax as computed by it. When the State of Wisconsin appealed from the order determining the death duties payable in respect of this estate, the appellant, executor, served a Notice of Review permissible under state practice as aforesaid, challenging the constitutionality of Section 72.74 Wis. Stats. on the ground that it necessarily operated to measure the tax imposed thereby upon property beyond the taxable situs of the State of Wisconsin, to-wit: Illinois and Florida, in contravention of the 14th Amendment to the Constitution of the United States as construed in *Frick v. Pennsylvania* (1925), 268 U. S. 473, 494, 495. (R. 92, pp. 10, 11, 12, 13 and 14 of Respondent's Brief in the State Supreme Court under head entitled "Argument in Support of Respondent's contention with Respect to the Second Question") This was argued to be so because the Wisconsin estate tax is in turn directly measured by the federal tax credit and the federal tax is levied upon property both within and without the taxable jurisdiction of the State of Wisconsin. 26 U. S. Code, Sec. 811.

The State Supreme Court, in its opinion upon the federal constitutional question so raised, passed upon it at the foot of page 6 and the head of page 7 of its opinion, as follows:

"Respondent contends that the construction sought by the State renders the law unconstitutional because as computed by the department of taxation, the Wisconsin taxes are imposed on property in Florida and Illinois as well as property within this state. If that be true, then it is unconstitutional. *Frick v. Pennsylvania* (1925), 268 U. S. 473, 494, 495, 69 L. Ed. 1058, 45 Sup. Ct. 603, 606.

"We are of the opinion that there is no such question presented on the facts in this case. While it is true that the estate tax is imposed in a 'catch-all' manner

by absorbing eighty per cent of the federal death tax, it is apparent that more than eighty per cent of the gross estate of Mr. Miller was within Wisconsin and therefore subject to taxation by this state."

On page 4 of the opinion of the State Supreme Court will appear the manner in which the Wisconsin 30% emergency tax has been construed and applied in this case, under step (3), sub-head "Wisconsin Emergency Tax" of "Table A" appearing on that page, to-wit:

"Wis. Normal Taxes (1)	220,682 12	
Wis. Estate Tax (2)	352 701 79	
Total	573,383 91	
30% Additional Tax		172,015 20

It will be observed that under this construction and method of computation, the 30% emergency death duty, laid by Section 72.74 Wis Stats., is always exactly 30% of the federal credit and therefore 24% of the federal 1926 basic tax, i. e. 30% of 80%, (reduced by 30% of death duties, if any, levied by other states) as shown by the illustrations of the operation and effect of the tax as hereinafter noted. The conclusion would appear to be inescapable that the 30% emergency death duty so laid by Wisconsin is directly geared to the federal tax, which, in turn, is based, as before stated, upon property both within and without the taxable jurisdiction of Wisconsin. That a substantial federal question thus arises appears to be manifest in the light of the holding of the Supreme Court of the United States in *Frick v. Pennsylvania* (1925), 268 U. S. 473, 494, 495, *supra*. The doctrine of this case, first announced in 1925, has ever since been consistently followed by the latter Court in the field of inheritance taxation and is one of the landmarks of the law of inheritance taxation in the United States.

In that case, the State of Pennsylvania, the state of decedent's domicile, sought to measure its inheritance tax in part on tangible personal property located in New York and

Massachusetts. But the Court denied the power of the state so to do. In that connection, it said at pp. 494, 495:

“(3) One ground on which the state court put its decision was that, in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the state had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the state's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail. If Pennsylvania could tax according to such a standard, other states could. It would mean, as applied to the Frick estate, that Pennsylvania, New York, and Massachusetts could each impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each state had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others.”

The following illustrations of the operation and effect of Section 72.74 Wis. Stats., levying the 30% Wisconsin

death duty, would seem to show conclusively that this tax is measured directly by the federal basic tax of 1926 when applied to different Wisconsin estates which are subject to different Wisconsin normal taxes but where the taxpayer in each case is required to pay a federal basic tax of \$125,000.00:

Wisconsin Normal Tax	Federal 80% Credit	Wisconsin Minimum Taxes as Construed by State Supreme Court	Additional Wisconsin Tax in Excess of Federal Credit	Additional Emergency Tax Expressed as % of Fed. Basic Tax
20,000	100,000	130,000	30,000	24%
30,000	100,000	130,000	30,000	24%
40,000	100,000	130,000	30,000	24%
50,000	100,000	130,000	30,000	24%
75,000	100,000	130,000	30,000	24%
100,000	100,000	130,000	30,000	24%

This may be further seen from the following table which shows the minimum Wisconsin taxes as construed and computed by the State Supreme Court which would be levied on a Wisconsin estate as the decedent's federal estate becomes subject to varying federal estate taxes:

Federal Basic Estate Tax	Federal 80% Credit	Total Wisconsin Taxes as Construed by State Supreme Court	Wisconsin Tax in Excess of Federal Credit	Additional Emergency Wisconsin Tax Expressed as % of Federal Basic Tax
100,000	80,000	104,000	24,000	24%
200,000	160,000	208,000	48,000	24%
300,000	240,000	312,000	72,000	24%
400,000	320,000	416,000	96,000	24%
500,000	400,000	520,000	120,000	24%

It will be seen that these Wisconsin taxes are wholly independent of the size, composition or manner of distribution of the decedent's Wisconsin estate. It is entirely unnecessary to even know what property the decedent had in Wisconsin in order to compute them.

Dated January 10, 1949.

A. W. SCHUTZ,
Attorney for Appellant, Executor.

APPENDIX "A"

IN SUPREME COURT, STATE OF WISCONSIN

AUGUST TERM, 1948

No. 43

In re Estate of FRED A. MILLER, Dec'd.:

STATE OF WISCONSIN, *Appellant*,

v.

OSCAR F. TREICHLER, ex'r., *Respondent*

Appeal from an order of the county court of Milwaukee county: C. A. Hansen, Judge. *Reversed.*

The will of Fred A. Miller, deceased, was duly probated in the county court of Milwaukee county. The estate was subject to death taxes imposed by the federal government and after allowance of all deductions there was a net estate of \$3,803,378.42 subject to Wisconsin inheritance taxes. From an order determining the Wisconsin inheritance taxes payable, the State of Wisconsin appeals:

HUGHES, J. The case requires a determination of the proper application of sec. 72.74, Wis. Stats. which imposes an additional emergency tax. The principal conflict between the State and the taxpayer arises from the question of whether in computing the amount due under sec. 72.50 the amount imposed by sec. 72.74 must be deducted from the federal credit allowed to the taxpayer for taxes paid the state.

The second contention of the taxpayer is that if the total Wisconsin tax should be so computed as to exceed the maximum federal credit allowed to said taxpayer, then it is unconstitutional.

Fred A. Miller died December 19, 1943, a resident of Milwaukee county. He left a gross estate of \$6,869,778.61. Of this total property there was real and tangible personal property of the value of \$979,936.23 located in the states

of Illinois and Florida. The rest of his property was in Wisconsin. Because of the value of the estate there was a federal death tax imposed in the amount of \$788,387.62.

The federal government allows credit to the taxpayer for taxes paid to all states, not, however, to exceed eighty per cent of the total imposed. The eighty per cent of federal estate tax credit available in this case was, therefore, \$630,709.62.

The first question which must be determined is whether this was intended as a ceiling beyond which states are not to be permitted to tax.

The purpose of the federal enactment appears to have been to protect states which theretofore had imposed estate taxes against the removal of wealthy citizens to states having no tax or a smaller tax.

Sec. 813 (b) of the Internal Revenue Code provides:

"The tax imposed by section 810 or 860 shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, or any possession of the United States, in respect of any property included in the gross estate. . . . The credit allowed by this subsection shall not exceed 80 per centum of the tax imposed by section 810 or 860"

If the entire estate lay within Wisconsin, the legislature could certainly tax beyond the death tax limits fixed by Congress as a minimum. It may be that an increase of thirty per cent will induce wealth to move from Wisconsin and thus in some instances defeat its own purpose as well as lose for the state the right to recapture the federal credit. This is, however, a matter for legislative concern, not judicial.

Secs. 72.01 to 72.24, Wis. Stats., impose the "normal" inheritance taxes. There is no question raised as to the validity of these provisions nor that, properly computed upon that portion of the Miller estate taxable in Wisconsin, the amount due the state therefor is \$220,682.12. There was paid to Illinois for taxes \$35,616.26 and to Florida \$21,709.45.

Sec. 7250, Wis. Stats., provides:

"In addition to the taxes imposed by sections 7201 to 7224, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the United States revenue act of 1926, and amendments thereto, where the decedent at the time of his decease was a resident of this state. The amount of said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding eighty per cent, allowable under said United States revenue act, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of the estate of the decedent had sections 7250 to 7261 not been enacted.

It is contended that since sec. 7250, Stats., provides that the estate tax shall be such sum as the federal credit allowable shall exceed the aggregate of all estate, inheritance, transfer, legacy and succession taxes, and that since sec. 7274 (2) imposes an emergency tax which is a form of inheritance tax, it, too, must be deducted in computing the amount due under sec. 7250. Such deduction would render sec. 7274 a nullity. It is apparent that the exemptions included in sec. 7250 were of the then existing estate and inheritance taxes, and were not intended as a bar to future legislation increasing the amount of state inheritance taxes. A reading of the statutes in the order of their enactment indicates an intention to impose by sec. 7274 an additional tax after deduction of all taxes previously allowed by sec. 7250.

The State's method of computation is:

TABLE A

(1) Wisconsin Normal Inherit. Taxes		\$220,682.12
(2) Wisconsin Estate Tax		
80% of U. S. Estate Tax	\$630,709.62	
Less: (a) Wis. Normal Taxes (1)	\$220,682.12	
(b) Ill. Inherit. Taxes	35,616.26	
(c) Fla. Inherit. Taxes	21,709.45	
Total State Taxes	278,007.83	
Difference		352,701.79
(3) Wisconsin Emergency Tax:		
Wis. Normal Taxes (1)	220,682.12	
Wis. Estate Tax (2)	352,701.79	
Total	573,383.91	
30% Additional Tax		172,015.20
Total Wisconsin Inheritance Taxes		\$745,399.11

The respondent's method of computation is:

TABLE B

80% Federal Credit		\$630,709.62
Deduct:		
Wisconsin Normal Inherit. Tax	\$220,682.12	
30% Wisconsin Inherit. Surtax	66,204.66	
Illinois Inherit. Tax	35,616.26	
Florida Estate Tax	21,709.45	
Total deductions		344,212.49
Difference between Federal Credit and aggregate Wisconsin Inheritance Taxes and death duties paid Illinois and Florida		286,497.13
Wisconsin Estate tax (above difference + 1/3)		220,382.41
Wisconsin Estate Surtax (balance of above difference, 2/3 of Wisconsin Estate Tax)		66,114.72
Total Wisconsin Estate Taxes		286,497.13

The material provisions of the emergency tax law are:

Sec. 72.74 (2) "In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61, an emergency tax for relief purposes, rehabilitation of returning veterans of World War II, construction and improvements at state institutions and other state property and for post-war public works projects to

relieve post war unemployment is hereby imposed upon all transfers of property which are taxable under the provisions of said sections and which are made subsequent to March 27, 1935 and prior to July 1, 1949 which said tax shall be equal to 30 per cent of the tax imposed by said sections."

It will be noted that if sec. 72.74 had never been enacted, the normal tax of \$220,682.12, plus the Illinois inheritance tax of \$35,616.26 and the Florida inheritance tax of \$21,799.45, would aggregate \$278,007.83, which, when deducted from the federal credit of \$630,709.62 as provided by sec. 72.74, would yield an estate tax of \$352,701.79, or a total, with the normal tax (\$220,682.12) of \$573,383.91. If we follow the taxpayer's computation on Table B, we arrive at the same total:

Normal tax	\$220,682.12
30% on Normal	66,204.66
Wis. Estate Tax	220,382.41
30% on Estate Tax	66,114.72
Total	\$573,383.91

The trial court allowed the taxpayer to deduct the normal tax plus the thirty per cent emergency tax figured on the normal. This yielded an estate tax of \$236,497.13, and the court allowed the thirty per cent thereon in addition. This followed neither the method contended for by the State nor that of the taxpayer, and produced a compromise order which is entirely indefensible.

Respondent contends that it is the court's duty to so construe the statute as to make it constitutional. We are of the opinion that it is the first duty of the court to give effect to the law as passed if the purpose is lawful.

The purpose of tax laws is primarily to produce revenue for the state. Certainly that was the purpose of the legislature when it enacted the emergency tax. If one interpretation gives the law effect and the other renders it a nullity, the one giving it effect is more reasonable and

must be adopted, unless to do so violates the taxpayer's constitutional guarantees.

Respondent contends that the construction sought by the State renders the law unconstitutional because, as computed by the department of taxation, the Wisconsin taxes are imposed on property in Florida and Illinois as well as on property within this state. If that be true, then it is unconstitutional. *Frick v. Pennsylvania* (1925), 268 U. S. 473, 494, 495, 69 L. Ed. 1058, 45 Sup. Ct. 603, 606.

We are of the opinion that there is no such question presented on the facts in this case. While it is true that the estate tax is imposed in a "catch-all" manner by absorbing eighty per cent of the federal death tax, it is apparent that more than eighty per cent of the gross estate of Mr. Miller was within Wisconsin and therefore subject to taxation by this state.

It is argued by counsel for respondent and *amici curiae* that situations might arise where such portion of the estate lay outside Wisconsin that to levy a tax under sec. 72.74, Stats. at all would be to tax property beyond the state. It would seem patent that in imposing the emergency tax, as in imposing the normal tax, care must be used to avoid taxing property beyond the jurisdiction of this state. However, we need make no further effort in pursuit of such speculation. We are met with no such situation here, since eighty-six per cent of the property belonging to the Miller estate was located in Wisconsin and the emergency tax imposed under the State's computation is upon something less than eighty per cent of the total federal taxes. As applied to the facts of this case, therefore, the computation does not constitute an attempt to levy a tax upon nor to measure a tax by property having a situs outside of Wisconsin, and must be held to be valid.

By the Court.—Order reversed and cause remanded with instructions to enter an order determining the tax in accordance with the State's computation.

(Appendix "B")

STATE OF WISCONSIN, COUNTY COURT, MILWAUKEE COUNTY,
IN PROBATE

In the Matter of the Last Will and Testament of FRED A.
MILLER, Deceased

DECISION # 237-023

The question for the Court to decide in the above entitled case is whether the thirty per cent Emergency Tax levied by *Section 72.74 Wisconsin Statutes* is measured by computing 30% of the normal inheritance tax, or whether it must be computed upon the "Estate Tax" created by *Sections 72.50 to 72.61*, where such sections are applicable.

The Court is of the opinion that *Sections 72.50 to 72.61* were enacted for the purpose of diverting from the Federal Government to the State Government the amount of the difference between the tax imposed by the State Inheritance Tax Law and the deduction allowed by the Federal Government without increasing the total taxes payable by the taxpayer.

This purpose and intent is clearly stated in *Section 72.56* which provides as follows:

"72.56 INTENT OF SECTIONS 72.50 to 72.61. It is hereby declared to be the intent and purpose of sections 72.50 to 72.61 to obtain for this state the benefit of the credit allowed under the provisions of said United States revenue act, to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes *and the same shall be liberally construed to effect this purpose.* (1931 c. 426)" *Note: Underseoring by the Court.*

The Court is therefore of the opinion that in computing the Wisconsin Estate Tax, the surtax on the normal inheritance tax, being an additional transfer tax, must be deducted from the Federal eighty per cent credit. Otherwise, the provisions of *Sections 72.50 to 72.61* would not accomplish the purpose for which they were created;

namely, to permit the entire deduction authorized by the Federal Estate Tax Statute without increasing the total taxes payable by the taxpayer.

Let an order in conformity with this decision be drafted by the attorney for the executor and presented to the Court for signature.

Dated at Milwaukee, Wisconsin, this 15th day of January, 1948.

By the Court:

C. A. HANSEN,
County Judge.

(1186).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. **37**

20

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE
OF FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

APPELLANT'S BRIEF

A. W. SCHUTZ,
Counsel for Appellant.

SUBJECT INDEX

	Page
Nature of Proceeding, federal statutory provision believed to sustain jurisdiction of this Court, and reference to official report of opinion in court below	1
Ground upon which jurisdiction of this Court is invoked	2
Statement of Case	4
Specification of errors relied upon	8
Summary of Argument	8
I-A. Wisconsin emergency inheritance tax is measured by property having a taxable situs within and without the state. It is unnecessary to ascertain what property has a taxable situs within the state but merely the taxes, if any, paid other states, in order to compute it, as construed by the State Supreme Court. This is believed to be beyond its taxing power as limited by the due process clause of the 14th Amendment to the Federal Constitution	
	8
I-B. Wisconsin does not allow deduction of death duties paid Illinois and Florida in proportion to their taxable proportion of the entire estate	
	9
I-C. 87.52% of total gross estate was within taxable jurisdiction of Wisconsin. If the 86% federal basic tax had been apportioned accordingly the state emergency inheritance tax and the total Wisconsin death taxes would have been materially less than those actually levied	
	9

II. The fact that the State of Wisconsin might have levied a Constitutional tax measured by the value of property within its taxing jurisdiction equal to or greater than the challenged tax does not operate to make the latter tax a valid exercise of its taxing power	10
III. The 80% federal basic estate tax credit by its express terms is extended to the tax paying estate and not to the state. Therefore, the State's death tax is limited by its taxing jurisdiction to the value of property having a taxable situs therein	10
Argument	
Proposition I-A, supra	11
Proposition I-B, supra	14
Proposition I-C, supra	15
Proposition II, supra	19
Proposition III, supra	20
Conclusion	21
Appendix	22
Federal 1926 basic estate tax provisions	22
Wisconsin normal inheritance tax	23
Wisconsin estate tax	27

TABLE OF CASES

Curry vs. McCanless, (1939) 307 U.S. 357, 363, 364, 365	10, 17
Frick vs. Pennsylvania (1925) 268 U.S. 473, 494, 495	3, 5, 6, 8, 10, 12, 18

Great Atlantic & Pacific Tea Co. vs. Grosjean (1937)	
301 U.S. 412, 424	10, 18
Home Savings Bank vs. Des Moines (1907) 205 U.S.	
503, 519	10, 20
Maxwell vs. Bugbee (1919) 250 U.S. 525	10, 18
Owensboro National Bank vs. Owensboro (1899)	
173 U.S. 664, 683	10, 19
Shepard, Estate of, (1924) 184 Wis. 88, 91, 96	10, 17
Union Refrigerator Transit Co. vs. Kentucky (1905)	
199 U.S. 194, 202	10, 18

STATUTES CITED

26 U. S. Code, Sec. 810	11
26 U. S. Code, Sec. 811	2, 3, 6, 11
26 U. S. Code, Sec. 813 b	10, 11, 21
Revenue Act of 1926, sec. 813 b	10
Sections 72.01 to 72.24, Wis. Stats.	5, 7
Sections 72.50 to 72.61, Wis. Stats.	2, 5, 7, 8
Section 72.74, Wis. Stats.	2, 5, 7, 8, 11, 13, 21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 547

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE
OF FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

Appeal from the Supreme Court of the State of Wisconsin

APPELLANT'S BRIEF

The judgment sought to be reviewed was entered in the Supreme Court of the State of Wisconsin, December 15, 1948 and is reported as Estate of Miller, 254 Wis. 24 (Adv. Sh.), 35 N.W. 2d 404 (R. 9-15). The application for appeal was presented to the Supreme Court for Wisconsin January 10, 1949, (R. 15, fol. 35), and was allowed by the Chief Justice of the Supreme Court of the State of Wisconsin on the same day (R. 16, fol. 35) and was docketed in this Court February 7, 1949 (R. 20, fol. 53). Probable jurisdiction was noted by this Court by its order dated March 14, 1949 (R. 20, fol. 53).

This is an appeal to this Court from the aforesaid judgment of the Supreme Court of the State of Wisconsin, reversing an order of the County Court of Milwaukee,

Co., Wisconsin, determining the death duties payable in respect to the estate of the above-named decedent, wherein the State appealed from the tax determination of the lower court and the executor above-named filed a notice of review under state practice averring the invalidity of one of the statutes levying death duties, to-wit: Section 72.74 Wis. Stats., as construed and computed by the Wisconsin Department of Taxation on the ground that it was repugnant to the due process clause of the 14th Amendment to the Constitution of the United States. The federal statutory provision averred to sustain the jurisdiction of this Court is Section 1257, clause (2), Title 28 of the United States Code. (Jurisdictional Statement, p. 2)

GROUND UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The State of Wisconsin under and by virtue of section 72.74 Wis. Stats. (infra p. 8) imposes what is therein denominated an emergency inheritance tax of 30% measured by the sum of

(1) its normal inheritance tax which is levied upon the transferees of a decedent's Wisconsin estate. Secs. 72.01 to 72.24 Wis. Stats., Appendix pp. 24-27) and

(2) its estate tax which is levied upon the decedent's estate as a whole and which is designed to and does cover into the state treasury the difference between the 80% credit allowed to a decedent's estate under the United States Revenue Act of 1926 (26 U.S. Code, Sec. 811) for state death duties paid in respect thereof and the aggregate amount of the Wisconsin normal inheritance tax and death duties, if any, paid other states (Secs. 72.50 to 72.61 Wis. Stats., Appendix p. 27, 28)

The decedent's estate consisted of property having a taxable situs in Wisconsin of the gross value of approximately seven million dollars and tangible, real and personal property having a taxable situs in the states of Illinois and Florida of approximately a million dollars. (R. 11)

The federal 80% credit in the sum of approximately \$630,000 (R. 11) under the United States Revenue Act of 1926, supra, was measured by decedent's property wherever situated within the taxing jurisdiction of the United States, that is to say upon tangible property in Illinois and Florida as well as tangible and intangible property in Wisconsin. (26 U.S. Code, Sec. 811) Thus in estates of Wisconsin residents subject to both the Wisconsin normal inheritance tax and the Wisconsin estate tax, the Wisconsin emergency tax under the statutory formula as applied in the case at bar is always 30% of 80% of the federal credit, to-wit, 24% of the federal basic tax less 30% of death duties, if any, paid to other states.

The ground, therefore, upon which the jurisdiction of this Court is invoked is based upon the proposition that the state of Wisconsin lacked the power to do what it did, that is, measure its emergency inheritance tax in whole or in part by the value of property of a kind and character, that is to say, tangible property, beyond its taxing jurisdiction and that it did thereby take the property of the estate in contravention of the due process clause of the fourteenth amendment to the Constitution of the United States as construed in *Frick v. Pennsylvania* (1925) 268 U.S. 473, 494, 495, relied upon by the appellant in the court below, wherein it was held that no state may directly or indirectly measure its death duties by the value of tangible property beyond its territorial juris-

diction. This is so because its devolution is controlled by the foreign state and is not dependent upon the laws of the state of domicile for the protection afforded by its laws.

STATEMENT OF THE CASE

The decedent died testate, a resident of the County of Milwaukee, Wisconsin, December 19, 1943. (R. 3, R. 10, 11, fols. 28, 29) He left a gross estate having a taxable situs in the State of Wisconsin of \$6,869,778.61 (R. 3) and a gross estate consisting of real and tangible personal property having a taxable situs in the States of Illinois and Florida of \$979,936.23. (R. 1, Item 9, R. 11, fol. 29) The total gross estate was therefore \$7,849,714.84. The net federal estate taxes assessed by the United States Commissioner of Internal Revenue against the estate of the decedent was in the sum of \$3,076,131.19, (R. 9, fols. 17-25) inclusive of the 80% credit for state death duties under the United States Revenue Act of 1926, in the sum of \$630,709.62, to-wit 80% of \$788,387.02, the basic federal tax subject to the credit. (R. 9, fols. 17-25) The normal Wisconsin inheritance tax was in the sum of \$220,682.12. (R. 7, fol. 13, R. 12, fol. 30) The Illinois inheritance tax was in the sum of \$35,616.25. (R. 7, R. 12, fol. 30) The Florida estate tax was in the sum of \$21,709.45. (R. 7, R. 12, fol. 30)

The State of Wisconsin, under and by virtue of Chapter 72 of the Wisconsin Statutes, as construed by the decision of the Supreme Court of Wisconsin, from which this appeal is had and taken, so far as relevant, levies the following death duties:

(a) a normal inheritance tax imposed upon the transferees of property of a decedent by reason of

his death; (Sec. 72.01 to 72.24 Wis. Stats.) (Appendix pp. 24-27)

(b) an estate tax levied upon the estate of the decedent as a whole measured by the difference between the normal inheritance tax above mentioned, (plus death duties, if any, levied by other states) and the credit allowable under the United States Revenue Act of 1926 for inheritance and estate taxes paid to the several states of the United States; (Sec. 72.50 to 72.61 Wis. Stats.) (Appendix p. 27, 28)

(c) an emergency death duty of 30% of the combined normal inheritance tax and Wisconsin estate tax mentioned in clauses (a) and (b) (Sec. 72.74 Wis. Stats.) (infra p. 8)

The County Court of Milwaukee County, by its order determining the Wisconsin death duties, assessed the 30% emergency tax laid by Section 72.74 Wis. Stats. on the Wisconsin estate tax as computed by it. (R. 7) When the State of Wisconsin appealed from the order determining the death duties payable in respect of this estate, the appellant executor served a Notice of Review permissible under state practice as aforesaid, challenging the constitutionality of Section 72.74 Wis. Stats. on the ground that it necessarily operated to measure the tax imposed thereby upon property beyond the taxable situs of the State of Wisconsin, to-wit: Illinois and Florida, in contravention of the 14th Amendment to the Constitution of the United States as construed in *Frick v. Pennsylvania* (1925), 268 U.S. 473, 494, 495. (R. 14, 15, fols. 33, 34, R. 16-18.) This was argued to be so because the Wisconsin estate tax is in turn directly measured by the federal tax credit and the federal tax is levied upon property both within and without the taxable jurisdiction

of the State of Wisconsin. 26 U.S. Code, Sec. 811. (R. 14, 15, fols. 33, 34)

The State Supreme Court, in its opinion upon the federal constitutional question so raised, passed upon it at the foot of page 6 and the head of page 7 of its opinion, as follows: (R. 14, 15, fols. 33, 34)

"Respondent contends that the construction sought by the State renders the law unconstitutional because as computed by the department of taxation, the Wisconsin taxes are imposed on property in Florida and Illinois as well as property within this state. If that be true, then it is unconstitutional. *Frick v. Pennsylvania* (1925), 268 U.S. 473, 494, 495, 69 L. Ed. 1058, 45 Sup. Ct. 603, 606." (emphasis added)

"We are of the opinion that there is no such question presented on the facts in this case. While it is true that the estate tax is imposed in a 'catch-all' manner by absorbing eighty per cent of the federal death tax, it is apparent that more than eighty per cent of the gross estate of Mr. Miller was within Wisconsin and therefore subject to taxation by this state."

On page 4 of the opinion of the State Supreme Court (R. 13, fol. 31) will appear the manner in which the Wisconsin 30% emergency tax has been construed and applied in this case, under step (3), sub-head "Wisconsin Emergency Tax" of Table "A" appearing on that page, to-wit:

TABLE "A"

(1) Wisconsin Normal Inherit. Taxes		\$220,682.12
(2) Wisconsin Estate Tax: 80% of U. S. Estate Tax	\$630,709.62	
Less: (a) Wis. Normal Taxes (1) ..	\$220,682.12	
(b) Ill. Inherit. Taxes	35,616.26	
(c) Fla. Inherit. Taxes	21,709.45	
Total State Taxes ...	278,007.83	
Difference		352,701.79
(3) Wisconsin Emergency Tax:		
Wis. Normal Taxes (1)	220,682.12	
Wis. Estate Tax (2)	352,701.79	
Total	573,383.91	
30% Additional Tax ..		172,015.20
Total Wisconsin Inheritance Taxes		\$745,399.11

Tax tenders under state practice were made in the aggregate sum of \$645,208.05 (R. 6).

The Statute of the State of Wisconsin, the validity of which is involved, so far as pertinent to this appeal, is Section 72.74 (2) Wis. Stats. of 1943, foot of p. 1177 and head of p. 1178. It reads as follows:

"72.74 *Emergency tax on inheritances.* (2) In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61 of the statutes, an emergency tax for relief purposes, rehabilitation of returning veterans of World War II, construction and improvements at state institutions and other state property and for post-war public works projects to relieve post-war unemployment is hereby imposed upon all transfers of property which are taxable under the provisions of said sections and which are

made subsequent to March 27, 1935 and prior to July 1, 1945 which said tax shall be equal to 30 per cent of the tax imposed by said sections."

SPECIFICATION OF ASSIGNED ERRORS

The appellant assigns as error:

1. That the Wisconsin Supreme Court erred in holding that Section 72.74, Wis. Stats. imposing the emergency tax in controversy, as construed and applied by it, was not in contravention of the due process clause of the 14th Amendment to the Constitution of the United States as construed by this court in *Frick v. Pennsylvania* (1925), 268 U.S. 473, 494, 495; (R. 17, fol. 37)

2. That the Wisconsin Supreme Court held it to be without significance that Section 72.74 Wis. Stats., as construed and applied by it, makes no provision for the proration of the emergency tax as between property having a taxable situs in the State of Wisconsin and property having a taxable situs in other states. (R. 17, fol. 37)

SUMMARY OF ARGUMENT

I-A.

The 30% Wisconsin Emergency Inheritance Tax imposed by Sec. 72.74 Wis. Stats. when applied to estates of Wisconsin residents subject to the Wisconsin Estate Tax imposed by Sec. 72.50 Wis. Stats. where 80% or more of the estate is within the taxable jurisdiction of the State of Wisconsin is always exactly 24% of the federal 1926 basic estate tax (i.e. 30% of 80%) reduced by 30% of death duties, if any, levied by other states. It is therefore directly measured by the federal tax, which in turn is based on the value of property both within and without

the taxing jurisdiction of Wisconsin. *It is entirely unnecessary to even know what property the decedent had in Wisconsin in order to compute it but merely the amount of death duties, if any, paid other states.* The statute provides for no apportionment thereof with respect to the value of property having a taxable situs within and without the state and the State Supreme Court held that none was required. This is believed to be beyond its taxing jurisdiction, and therefore a deprivation of property foreclosed by the due process clause of the 14th Amendment to the Federal Constitution.

I-B.

In the case at bar 12.48% of the total gross estate was not within the taxing jurisdiction of the State of Wisconsin. Apportioning 12.48% of the 80% federal basic estate credit to the States of Illinois and Florida results in the allocation of \$78,712 to those states. But the deduction allowed for death duties paid to those states by the State of Wisconsin was only \$57,325 (i.e. 35,616, Ill. tax plus 21,709, Fla. tax) See p. 8 of this brief. The difference to-wit: \$21,387 was therefore disallowed by the State of Wisconsin as a deduction from the federal credit and operated to increase pro tanto its emergency inheritance tax by 30% of that sum, an amount also beyond its taxing jurisdiction.

I-C.

87.52% of the total gross estate was within the taxing jurisdiction of the State of Wisconsin. If the 80% federal basic estate tax credit had been apportioned accordingly, the total Wisconsin death taxes would have been \$101,545 less than those actually levied, and results in a difference of \$23,433.20 in the emergency tax.

Frick vs. Pennsylvania (1925) 268 U.S. 473, 494, 495.

Estate of Shepard (1924) 184 Wis. 88, 91, 96.

Curry vs. McCanless (1939) 307 U.S. 357, 363, 364, 365.

Union Refrigerator Transit Co. vs. Kentucky (1905) 199 U.S. 194, 202.

Maxwell vs. Bugbee (1919) 250 U.S. 525.

Great Atlantic & Pacific Tea Co. vs. Grosjean (1937) 301 U.S. 412, 424.

II.

The fact that the State of Wisconsin might have levied a Constitutional tax measured by the value of property within its taxing jurisdiction equal to or greater than the challenged tax does not operate to make the latter tax a valid exercise of its power to tax.

Owensboro National Bank vs. Owensboro (1899) 173 U.S. 664, 683.

Home Savings Bank vs. Des Moines (1907) 205 U.S. 503, 519.

III.

The 80% federal basic estate tax credit by its express terms is extended to the tax paying estate and not to the state. Therefore, the State's death tax is limited by its taxing jurisdiction to the value of property having a taxable situs therein.

26 U.S. Code, sec. 813 b.

Revenue Act of 1926, sec. 813 b.

ARGUMENT

I-A.

The State of Wisconsin lacked the power to measure in whole or in part its 30% emergency inheritance tax by the value of property, that is to say, tangible property, real and personal, having a taxable situs beyond its taxing jurisdiction by employing as such measure a federal tax levied upon the value of property having a taxable situs both within and without the state.

It will be observed that under the State Supreme Court's construction of the statute and method of computation thereunder, the 30% emergency death duty, laid by Section 72.74 Wis. Stats., is always exactly 30% of the federal 1926 basic estate tax credit (26 U.S. Code, sec. 813 b) and therefore 24% of the federal 1926 basic estate tax, (26 U.S. Code, sec. 810) i.e. 30% of 80%, (reduced by 30% of death duties, if any, levied by other states) as shown by the illustrations of the operation and effect of the tax as hereinafter noted. The conclusion would appear to be inescapable that the 30% emergency death duty so laid by Wisconsin is directly geared to the federal tax, which, in turn, is based, as before stated, upon property both within and without the taxing jurisdiction of Wisconsin.

26 U.S. Code, sec. 811, so far as material, reads:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States
• • •"

That a substantial federal question thus arises appears to be manifest in the light of the holding of this Court

in *Frick v. Pennsylvania* (1925), 268 U.S. 473, 494, 495. The doctrine of this case, first announced in 1925, has ever since been consistently followed by this Court in the field of inheritance taxation and is one of the landmarks of the law of inheritance taxation in the United States.

In that case, the State of Pennsylvania, the state of decedent's domicile, sought to measure its inheritance tax in part on the value of tangible personal property located in New York and Massachusetts. But the Court denied the power of the state so to do. In that connection, it said at pp. 494, 495:

- “(3) One ground on which the state court put its decision was that in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the state had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the state's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail. If Pennsylvania could tax according to such a standard, other states could. It would mean, as applied to the Frick estate, that Pennsylvania, New York, and Massachusetts could each impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each state had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate;

but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others."

The following illustrations of the operation and effect of Section 72.74 Wis. Stats., levying the 30% Wisconsin death duty, would seem to show conclusively that this tax is measured directly by the federal basic tax of 1926 when applied to different Wisconsin estates which are subject to different Wisconsin normal taxes but where the taxpayer in each case is required to pay a federal basic tax of \$125,000.00:

Wisconsin Normal Tax	Federal 80% Credit	Wisconsin Minimum Taxes as Construed by State Supreme Court	Additional Emergency Tax in Excess of Federal Credit	Additional Emergency Tax Expressed as % of Fed. Basic Tax
20,000	100,000	130,000	30,000	24%
30,000	100,000	130,000	30,000	24%
40,000	100,000	130,000	30,000	24%
50,000	100,000	130,000	30,000	24%
75,000	100,000	130,000	30,000	24%
100,000	100,000	130,000	30,000	24%

This may be further seen from the following table which shows the minimum Wisconsin taxes as construed and computed by the State Supreme Court which would be levied on a Wisconsin estate as the decedent's federal estate becomes subject to varying federal estate taxes:

Federal Basic Estate Tax	Federal 80% Credit	Total Wisconsin Taxes as Construed by State Supreme Court	Additional Emergency Tax in Excess of Federal Credit	Additional Emergency Wisconsin Tax Expressed as % of Fed. Basic Tax
100,000	80,000	104,000	24,000	24%
200,000	160,000	208,000	48,000	24%
300,000	240,000	312,000	72,000	24%
400,000	320,000	416,000	96,000	24%
500,000	400,000	520,000	120,000	24%

It will be seen that this Wisconsin tax is wholly independent of the size, composition or manner of distribution of the decedent's Wisconsin estate. *It is entirely unnecessary to even know what property the decedent had in Wisconsin in order to compute it but merely the amount of death duties, if any, paid other states.*

In the case at bar, quoting figures to the nearest dollar, the basic federal estate tax under the 1926 Act was \$788,387, the 80% credit, 80% of that sum, to-wit \$630,709. 30% of this credit is \$189,212, which is 24% of the basic federal tax (i.e. \$788,387). The death duties paid the states of Illinois and Florida were in the aggregate sum of \$57,325. 30% of the latter sum is \$17,197. Thus subtracting, therefore, 30% of the total Illinois and Florida death duties, to-wit said sum of \$17,197 from 24% of the basic federal estate tax in the sum of \$189,212 aforesaid leaves \$172,015, the emergency inheritance tax in controversy levied by the State of Wisconsin. Thus it is made manifest beyond cavil that under the challenged decision of the state court which by that decision is expressly made applicable to the estate of every Wisconsin resident where 80% or more of his estate has a taxable situs in Wisconsin and is subject to both the state normal and estate tax, the emergency inheritance tax is always equal to 24% of the federal basic estate tax less 30% of death duties paid other states.

I-B.

In the case at bar 12.48% of the total gross estate of the decedent was not within the taxing jurisdiction of the State of Wisconsin but within the exclusive taxing jurisdiction of Illinois and Florida, that being the ratio ex-

pressed percentage-wise obtained by dividing the aggregate gross value of the Illinois and Florida property, to-wit \$979,936 by the total gross value of the decedent's estate, to-wit \$7,849,714. But 12.48% of the federal 80% basic estate tax credit is \$78,712.56 a sum substantially in excess of the aggregate Illinois and Florida death duties, which were in the sum of \$57,325 and upon which the State of Wisconsin allowed a deduction of 30% thereon against the 80% credit. Hence it will be seen that even if the State of Wisconsin had the power to measure its tax by the value of property beyond its taxable jurisdiction it does not base its deduction for out of state death duties upon the proper proportion or allocation of the property not subject to its taxing jurisdiction.

I-C.

Again, if the State of Wisconsin for the purposes of the 30% emergency inheritance tax had confined itself to availing itself of its proper proportion of the 80% federal credit and no more, namely 87.52% (i.e. \$6,869,778, the Wisconsin estate, divided by \$7,849,714 the total estate) its proportion of the credit would have been \$552,597 in lieu of \$630,709. Subtracting therefrom the state normal inheritance tax and the aggregate death duties paid Illinois and Florida we obtain the following table for the computation of the 30% state emergency tax as well as total Wisconsin death duties.

HYPOTHETICAL TABLE (FEDERAL CREDIT APPORTIONED)

(1) Wisconsin Normal Inheritance Taxes	\$220,682.00
(2) Wisconsin Estate Tax: 87.52% of Federal basic estate tax credit \$630,709 allocable to Wis. Taxable estate.	\$552,597.00
Less: (a) Wis. Normal Inherit. Tax.	\$220,682.00
(b) Ill. Inherit. Tax	35,616.00
(c) Fla. Estate Tax	21,709.00
Total contra items under Sec. 72.50 Wis. Stats.	278,007.00
Wisconsin Estate Tax	274,590.00
(3) Wisconsin Emergency Tax:	
Wis. Normal Taxes...	\$220,682.00
Wis. Estate Tax	274,592.00
Total	495,274.00
30% Emergency Tax thereon	148,582.00
Total Wis. death duties	\$643,854.00

A comparison of the state's table of computation (p. 8 of this brief, R. 13, fol. 31) with the foregoing Hypothetical Table gives us the measure of error, i.e. the excess in tax which was beyond the state's power to levy and therefore confiscatory had it confined itself to its proper proportion of the federal credit. This excess is \$101,545.00 (i.e. 745,399 — 643,854), and results in a difference of \$23,433.20 in the emergency tax.

Hence it becomes quite clear that to bring the state statute imposing the Wisconsin 30% emergency inheri-

tance tax within the applicable constitutional limitation of the due process clause of the 14th Amendment to the federal Constitution, the statute necessarily requires amendment by the state legislature by adding thereto a proviso that in computing the Wisconsin Estate Tax for the purposes of the 30% emergency inheritance tax only so much of the federal 80% credit aforesaid may be employed as the proportion of the value of the gross estate subject to the taxing jurisdiction of Wisconsin bears to the total gross estate of the decedent.

That the Wisconsin Supreme Court in an earlier decision (1924) fully recognized that it was without power to impose a death duty upon property beyond its jurisdiction clearly appears from the majority opinion in the case of *Estate of Shepard*, 184 Wis. 88, where the following language apposite to the contentions of the appellant was employed (p. 91).

"The state must have jurisdiction of the subject matter of the tax. Such subject matter is the transfer of title to property from a decedent to another. If the state has nothing to do with such transfer, it has no jurisdiction to impose an inheritance tax * * *. Either the property transferred must be within the state or the decedent must have died a resident thereof or some recourse to the courts or laws of our state must be necessary to secure the transfer in order to confer jurisdiction to impose a valid tax."

Then to further emphasize that the question was one of power to impose the tax, the court further observed. (p. 96)

"But it is a question of power not of policy."

This view of the question is further expounded in still more apposite terms in the decision of this court in *Curry v. McCanless* (1939) 307 U.S. 357, in the opinion by Justice Stone, wherein it was said (p. 363):

"That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for purposes of the jurisdiction of a court to make disposition of putative rights in them for purposes of conflict of laws, and for purposes of taxation is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since."

(pp. 364, 365) "• • • Other states have been said to be without jurisdiction and so without Constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax. See *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 202, *Frick v. Pennsylvania*, 268 U.S. 473, 489, et seq."

"Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is rights which are not related to physical things."

The case of *Maxwell v. Bugbee* (1919) 250 U.S. 525, distinguished in the *Frick* case, involved the inheritance tax law of New Jersey which expressly provided for measuring the tax on the transfer of property within the state of a non-resident decedent upon the proportion which the local property bore to the entire estate. It is this provision which is wholly absent from the Wisconsin statute imposing the emergency tax and which in the case at bar the Wisconsin Supreme Court treated as without significance.

Likewise the case of *Great Atlantic & Pacific Tea Co. v. Grosjean* (1937) 301 U.S. 412 which involved the imposition of an occupation or license tax upon chain stores by the State of Louisiana measured by the proportion which the number of intra state stores bore to the total

number of both intra and extra state stores was held valid by the very fact that an apportionment was required by the state law. This court at p. 424 reiterated the position it took in the *Frick* case which it expressly cited as follows:

"Second. The appellants contend the Act deprives them of property without due process of law because the tax is imposed, at least in part, upon things which are beyond the jurisdiction of Louisiana. The State may not tax real or tangible personal property lying outside her borders; nor may she lay an excise or privilege upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed. But as we have seen, the subject of the tax in question is the prosecution of a defined business activity within the State of Louisiana—the conduct of a retail store which is part of a chain under a single management, ownership or control—a legitimate subject of a license or occupation tax." (Citing among others the *Frick* case).

II.

It is of course self-evident that the State of Wisconsin, had it within its constitutional power to lay an inheritance tax equal to the challenged tax or greater (short of confiscation) on property within its taxable jurisdiction but as this court was at pains to point out in *Owensboro National Bank v. Owensboro*, 173 U.S. 664 at p. 683.

"If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the Act of Congress, then that Act becomes meaningless and the power to enforce it in any given case will not exist. This follows that if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any given case.

The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid does not strike us as worthy of serious consideration."

This question, therefore, revolves itself into a pure question of power to do one or the other thing, and not into an inquiry as to whether the state could accomplish lawfully an equal or greater revenue yielding result so far as the money proceeds of the tax is concerned. It was so expressly ruled in *Home Savings Bank vs. Des Moines* (1907) 205 U.S. 503, at p. 519.

"It is said that where a tax is levied upon a corporation, measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. But the two kinds of taxes are not equivalent in law, because the state has the power to levy one, and has not the power to levy the other. The question here is one of power, and not of economics. If the state has not the power to levy this tax, we will not inquire whether another tax, which it might lawfully impose, would have the same ultimate incidence."

III.

Moreover, it does not follow that because the federal estate tax act makes it possible for the states to absorb the 80% credit by the levy of a state death tax, a state tax may be imposed on and measured by the credit so absorbed without apportionment for the obvious reason that the federal credit becomes available through the exercise of the taxing power of the several states which in turn is

limited to property having a taxable situs therein. The credit by its express terms is extended to the taxpayer and not to the state. (26 U. S. Code, sec. 813 b) When the states, therefore, in order to cover into their treasuries all or any part of the amount of the credit so extended to the taxpaying estate, levy a state tax therefor, they may not under the holding in the *Frick* and related cases use the credit as a measure of the tax without apportionment as between property within and without its jurisdiction to tax, since Congress alone possesses the power to levy an estate or inheritance tax on the value of property beyond the taxable jurisdiction of any one of the states.

CONCLUSION

It is accordingly for the reasons stated respectfully submitted that Section 72.24 Wis. Statutes as construed and applied by the State Supreme Court is an unconstitutional exercise of the State's power of taxation as limited by the due process clause of the 14th Amendment.

A. W. SCHUTZ,

Counsel for Appellant.

APPENDIX

Statutes Involved

FEDERAL 1926 BASIC ESTATE TAX

26 U. S. Code, Sec. 810, so far as material, reads:

"A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title. (here follows table of rates)

26 U. S. Code, sec 813 a, so far as material, reads:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States * * *

26 U. S. Code, sec. 318 b, so far as material, reads:

"The tax imposed by section 810 * * * shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, or any possession of the United States, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent). The credit allowed by this subsection shall not exceed 80 per centum of the tax imposed by section 810 * * *

Note: *Revenue Act of 1926, sec. 813 b*, so far as material, read:

"The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any

property included in the gross estate. The credit allowed by this subdivision shall not exceed 80 per centum of the tax imposed by this section, and shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 304."

WISCONSIN NORMAL INHERITANCE TAX

The provisions of sections 72.01 to 72.24 *Wisconsin Statutes 1943* imposing the "normal" inheritance taxes, so far as material, are as follows:

"72.01 Subjects liable. A tax shall be and is hereby imposed upon any transfer of property, real or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation, except county, town or municipal corporations within the state, for strictly county, town or municipal purposes, and corporations of this state organized under its laws or voluntary associations organized solely for religious, charitable or educational purposes, which shall use the property so transferred exclusively for the purpose of their organization, within the state, in the following cases, except as hereinafter provided:

"(1) While a resident of state. When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state.

"(2) Nonresident's property within the state. * * *

"(3) Transfers in contemplation of death. * * *

"(4) Transfer before or after passage of act. * * *

"(5) Transfer under power of appointment. * * *

"(6) Joint interests. * * *

"(7) Insurance part of estate. * * *

"(8) Basis of tax. The tax so imposed shall be upon the clear market value of such property at the rates hereinafter prescribed and only upon the excess of the exemptions hereinafter granted. Inheritance and estate taxes imposed by the government of the United States shall be deemed debts and shall be deducted in determining the value of the property transferred.

"(9) Reciprocity as to nonresident decedents.
• • •"

"72.02 Primary rates, where not in excess of twenty-five thousand dollars. When the property or any beneficial interest passes by any such transfer, where the amount of the property shall exceed in value the exemption specified in section 72.04, and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

"(1) Two per centum, where. (Close relationships set forth.)

"(3) Six per centum, where. (More remote relationships set forth.)

"(4) Eight per centum, where. (Distant relationships set forth.)"

"72.03 Other rates, where in excess of twenty-five thousand dollars. The foregoing rates in section 72.02 are for convenience termed the primary rates. When the amount of the clear value of such property or interest exceeds twenty-five thousand dollars, the rates of tax upon such excess all be as follows:

"(1) (Twice primary rates on \$25,000 to \$50,000.)

"(2) (Three times primary rates on \$50,000 to \$100,00.)

"(3) (Four times primary rates on \$100,000 to \$500,000.)

"(4) (Five times primary rates over \$500,000.)"

"72.035 Rate limit. The tax imposed by section 72.02 and section 72.03 shall not exceed 15 per cent of the property transferred to any beneficiary."

"72.04 Exemptions. The following exemptions from the tax, to be taken out of the first twenty-five thousand dollars, are hereby allowed:

"(1) (Transfers to municipal corporations and for religious, charitable, educational, etc. purposes.)

"(2) (\$15,000 to widow, \$5,000 to husband, and \$2,000 to each beneficiary within close relationship in the 2% bracket)

"(4) (\$250 to each beneficiary within more remote relationship in 6% bracket)

"(5) (\$100 to each beneficiary within distant relationship in 8% bracket)

"(6) (Exemption of resident's tangible personal property located out of the state)

"(7) (Bequests for burial lot, etc.)

"(8) Whenever a tax may be due from the estate, or the beneficiaries therein, of any resident or non-resident decedent, upon the transfer of any property, when the property or estate left by such decedent is partly within and partly without this state, or upon any stocks, bonds, mortgages or other securities representing property or estate partly within or partly without the state, any beneficiary of such estate shall be entitled to deduct only a proportion of his share of the debts, expenses of administration, and of his Wisconsin exemption, equal to the proportion which his interest in the property within the state or within its jurisdiction bears to his entire interest in such estate." * * *

"72.12 County Courts. (1) Jurisdiction. The county court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under the inheritance tax laws, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have

jurisdiction to hear and determine all questions arising under the provisions of the inheritance tax laws and to do any act in relation thereto authorized by law to be done by a county court in other matters or proceedings coming within its jurisdiction; and if two or more county courts shall be entitled to exercise any such jurisdiction, the county court first acquiring jurisdiction hereunder, shall retain the same to the exclusion of every other county court.

"(2) • • •

"(3) • • •

"72.15 Hearing and determination of Tax. (1)
• • •

• • • •

"(10) Order of county court determining value of estates and liability to tax. Upon the determination by the county court of the value of any estate which is taxable under the inheritance tax laws, and of the tax to which it is liable, an order shall be entered by the court determining the same, which order shall include a statement of (a) the date of death of the decedent, (b) the gross value of the real and personal property of such estate, stating the principal items thereof, (c) the deductions therefrom allowed by the court, (d) the names and relationship of the persons entitled to receive the same, with the amount received by each, (e) the rates and amounts of inheritance tax for which each such person is liable, and the total amount of tax to be paid, (f) a statement of the amount of interest or penalty due, if any. Such order shall be in the form prescribed by the department of taxation. A copy of the same shall be delivered or mailed to the county treasurer, the state treasurer, and the department of taxation, and no final judgment shall be entered in such estates until due proof is filed with the court that such copies have been so delivered or mailed.

“••••”

“72.23 Taxes; payment; application. All taxes levied and collected under sections 72.01 and 72.24, inclusive, less any expenses of collection, the percentage to be retained by the county, and the deduction authorized under sections 72.01 to 72.24, inclusive, shall be paid into the treasury of the state for the use of the state, and shall be applicable to the expenses of the state government and to such other purposes as the legislature may by law direct.”

“72.24 Definitions. •••

WISCONSIN ESTATE TAX

The provisions of sections 72.50 to 72.61, *Wisconsin Statutes 1943* imposing the state estate tax, so far as material, are as follows :

“72.50 Tax imposed. In addition to the taxes imposed by sections 72.01 to 72.26, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the United States revenue act of 1926, and amendments thereto, where the decedent at the time of his decease was a resident of this state. The amount of said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding eighty per cent, allowable under said United States revenue act, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of the estate of the decedent had sections 72.50 to 72.61 not been enacted. The tax imposed herein shall be collected by the several county treasurers for the use of the state, and shall be ac-

counted for and paid into the state treasury within the time and in the manner specified in section 72.19."

• • • •

"72.61 Provisions applicable. The provisions of chapter 72, relating to the tax on inheritances and transfers, shall apply to the taxes imposed by sections 72.50 to 72.61 in so far as the same are applicable and not in conflict with the provisions hereof."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 20

**OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE
OF FRED A. MILLER,**

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

APPELLANT'S REPLY BRIEF

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INDEX

Subject Index

	Page
Reply to Subdivision I-A of Appellee's Argument	2-4
Reply to Subdivision I-B of Appellee's Argument	4-6
Reply to Subdivision I-C of Appellee's Argument	6
Reply to Subdivision I-D of Appellee's Argument	6
Reply to Subdivision I-E of Appellee's Argument	6-7
Reply to Subdivision I-F of Appellee's Argument	7
Reply to Subdivision II of Appellee's Argument	7-8
Conclusion	9

Table of Cases

Butler Bros. v. McColgan, (1942) 315 U.S. 501	2, 3
Edison California Stores, Inc. v. McColgan, (1947) 30 Calif. (2d) 472, 176 Pac. (2) 697, 183 Pac. (2) 16.	2
Frick v. Pennsylvania (1925) 268 U.S. 473	5, 7, 9
Great Atlantic & Pacific Tea Co. v. Grosjean (1937) 301 U.S. 412	7
Home Savings Bank v. Des Moines (1907) 205 U.S. 503.	5
Maxwell v. Bugbee (1919) 250 U.S. 525	7
Owensboro National Bank v. Owensboro (1899) 173 U.S. 664.	5
State of Wisconsin v. J. C. Penney Co., (1940) 311 U.S. 435.	7

Statutes Cited

Sections 72.01 to 72.24, Wis. Stats.	2, 4
Sections 72.50 to 72.61, Wis. Stats.	2, 4, 8
Section 72.74, Wis. Stats.	2, 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 20

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE
OF FRED A. MILLER,

Appellant,

v.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

APPELLANT'S REPLY BRIEF

This reply brief for convenience and for the sake of clarity is keyed to the divisions of Appellee's argument. Before replying, however, specifically to the arguments of the Appellee, it should be observed that Table "A" at page 26 of Appellee's brief under subdivision I-E does not accurately reflect the construction of the emergency inheritance tax by the Supreme Court of Wisconsin as reproduced at p. 13 of the record (254 Wis. 24 at p. 28) being the Table "A" approved by it, in that, as will be seen by inspection, the state supreme court construed the emergency tax as a *single integral tax* computed on the combined Wisconsin normal and Wisconsin estate taxes and not as two *separate and distinct* emergency taxes. This conforms to the statutory reference thereto as fol-

lows: "In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61 of the statutes an emergency tax * * * is hereby imposed * * *." (Sec. 72.74(2) Wis. Stats.) (emphasis added) *Thus, under the unambiguous statutory formula unaided by construction to the contrary, the Wisconsin normal and estate taxes are reciprocal variables always producing an emergency tax equal to 24% of the federal basic tax less 30% of death duties paid other states in the case of Wisconsin estates subject to the Wisconsin estate tax.*

I-A (pp. 15-18)

Appellee in this subdivision of its argument cites in support thereof *Butler Bros. v. McGolgan* (1942) 315 U.S. 501 and *Edison Stores, Inc. v. McGolgan* (1947) 30 Cal. (2d) 472, 176 Pac. (2) 697, 183 Pac. (2) 16, which latter case was decided so far as the constitutional question was involved on the authority of the *Butler Bros.* case, and both were based on the same California statute. It makes the bold assertion that the appellant carries the burden of showing by "clear and cogent evidence" that the Wisconsin Statute here under consideration results in extra-territorial values being taxed. That the *Butler Bros.* case is not in point is obvious for the following reasons.

1. In the *Butler Bros.* case, the statute itself recognized the necessity for apportionment and properly provided therefor, whereas the Wisconsin Emergency Inheritance Tax Statute makes no provision for such apportionment.

2. In the *Butler Bros.* case the question whether or not extraterritorial property was employed as a measure of the tax was considered as depending for resolution wholly upon conflicting facts. These facts being resolved against the taxpayer the "clear and cogent evidence" rule

is analogous to the appellate rule in equity cases that a finding of fact by the trial forum may not be disturbed unless against the clear weight and great preponderance of the evidence. It has no application in the case at bar since there never was and is not now a dispute as to the facts.

3. In that case (*Butler Bros.*, being an Illinois corporation), a California statutory income tax apportionment formula was the subject in controversy. It is elementary that income taxes have never been considered in the same category as inheritance taxes with respect to a state's power to levy them. The objects forming the incidence of the tax and the rules governing the exercise of the power are readily distinguishable. For example, the right to income is an intangible property right and not tangible property. A state may therefore tax a resident thereof domiciled therein upon the net income derived from extraterritorial tangible property (300 U.S. 308), whereas the subject and incidence of an inheritance tax is based on a state's control of the devolution of any particular tangible or intangible property as the case may be. In the same subdivision of Appellee's argument, Appellee recites that the "design and application" of the Wisconsin inheritance tax statutes "is such as to impose taxes only on the property which is within the taxing jurisdiction of the State of Wisconsin" (page 18). So far as this statement is intended to include within its sweep, the emergency inheritance tax in question, it clearly begs the whole question at issue herein.

The criticism of Appellant's tables on p. 13 is wholly without support in the facts, since the emergency tax is always 24% of the federal basic estate tax less death duties paid other states, regardless of the amount or character of any decedent's estate.

The criticism of Appellant's hypothetical table on page 16 is likewise unsound since it follows precisely the factors required by the state statute when the federal credit is properly apportioned as between property subject to the state's taxing jurisdiction and property not so subject. Surely the state should not be heard to complain because of the Appellant's failure to assign as error the failure to apportion the Wisconsin estate tax, a tax which in Appellant's opinion is also subject to apportionment. Simply because the laws of another taxing sovereignty operate to indemnify the taxpayer against an unconstitutional tax of another does not make such tax any the less invalid. Here the indemnifying sovereignty is the federal government. It might as well also be one of the several states or even a foreign government. The taking is nevertheless beyond the taxing state's power.

I-B (pp. 18-22)

Appellee argues that because the language of the Wisconsin emergency tax statute recites that the "30% additional tax 'is hereby imposed upon all transfers of property which are taxable under the provisions of' Sections 72.01 to 72.24 and Sections 72.50 to 72.61" (p. 18), only Wisconsin property is being employed as a measure of the tax. But Sections 72.50 to 72.61 levying the so-called Wisconsin Estate Tax is expressly laid upon and measured by the federal basic estate tax credit less, so far as material, death duties paid the states. Hence the property forming the measure of this tax is all property within the taxing jurisdiction of the United States and not merely Wisconsin property. The demonstration of the Appellee based on the language of the statute is therefore clearly invalid.

The principal burden of this subdivision of the argument is that the state of Wisconsin has taken in dollars less than its properly apportioned share of the federal credit (87.52%) viz. 55.92%. But this figure is in fact in error by 25% as will be seen from the state's own computation of the emergency tax as construed by the state supreme court, Table "A" R. 13, 254 Wis. 24 at p. 28, (i.e. $630,709.62 - 57,325.71 = 573,383.91$ or 90.92% of the federal credit), which it will be seen is in excess of the apportionment which the statute should have required.

It arrives at the former figure by declaring that the deductions from the basic federal credit, namely the normal tax and taxes paid Florida and Illinois, so operate, but insists that these deductions are matters of legislative grace by which of course can only be meant that the state is not required to allow them as a matter of right, but is otherwise entitled to take the full federal credit. Moreover, 24% of the federal basic tax is also materially less than 80% of the federal credit, but even that tax is still measured by property beyond the taxing jurisdiction of the state.

Here we find the core fallacy of the state's position, which has been expressly rejected by this court in the cases of *Owensboro National Bank v. Owensboro* and *Home Savings Bank v. Des Moines*, more fully cited in Branch II of Appellant's argument. This is not, as was there held, a question of economic equivalence, but whether or not the state has the power to incorporate in its tax base for the reasons stated in the *Frick* case resolving the question in the negative the value of tangible property beyond its taxing jurisdiction, regardless of whether the method actually adopted produces a lesser,

equal or greater revenue, than would be the case were such property excluded from the tax base. These cases would clearly appear to require a negative answer on the cogency of their reasoning.

I-C (pp. 23-24)

The Appellant makes no claim that the total Wisconsin Inheritance Taxes may not exceed the federal credit as will be readily seen from an analysis of Appellant's hypothetical table on page 16 of Appellant's brief. Hence Appellee's argument in relation thereto in connection with extraterritoriality is wholly irrelevant.

I-D (pp. 25-26)

Appellant argues that were the entire estate of the decedent in Wisconsin, the total Wisconsin Inheritance Taxes would be larger. This is so obvious that its relevancy does not appear. But the unqualified statement of Appellee that the Appellant asserts the total Wisconsin Inheritance taxes are higher because of out of state property reveals a misconception of Appellant's position, which is that the total death duties levied by the state are higher than they would have been if the federal credit had been apportioned, as will fully appear from Appellant's hypothetical table on page 16 of Appellant's brief.

I-E (pp. 27-28)

The Appellant makes no contention that the state may not take into consideration extraterritorial factors in laying a tax. His sole contention is that when such factors are taken into consideration, the tax must nevertheless

be apportioned as between the incidence of the tax within and without the taxing jurisdiction of the state. Appellee cites *Maxwell v. Bugbee* and *Great Atlantic & Pacific Tea Co. v. Grosjean*, the very cases cited by Appellant as expressly requiring apportionment in such a case. The Appellant is at a loss to see where the *J. C. Penney Co.* case involving the taxation of net income, also cited by Appellee on this point, has any relevancy.

Moreover, in the *Frick* case, the very same argument that the state brings forward to the effect that it is taxing only Wisconsin property since more than 80% of the decedent's estate was subject to its taxing jurisdiction would have validated the tax there, since the highest bracket of Pennsylvania's inheritance tax was only 5% and it is apparent that more than 5% of the *Frick* estate was within the taxing jurisdiction of Pennsylvania.

I-F (pp. 29-31)

From what has already been said, Appellee's argument under this subdivision of its argument clearly begs the whole question at issue in the case at bar, namely the state's assertion that the pattern of the Wisconsin Inheritance Tax Statutes is the imposition of taxes only on property within its jurisdiction.

II (pp. 32-34)

The second branch of Appellant's argument to the effect that the 30% of additional emergency inheritance tax is not directly geared to the federal estate tax and that Appellant's statement that this tax is always 30% of the federal estate tax credit and 24% of the federal basic estate tax is both incorrect and misleading is itself incorrect and misleading, in that Appellant expressly

added the qualifying factor "reduced by 30% of death duties, if any, levied by other states". By reference to Appellant's brief, it will be seen that the Appellant stated his position as follows: (p. 8 of Appellant's brief)

"The 30% Wisconsin Emergency Inheritance Tax imposed by Sec. 72.74, Wis. Stats. when applied to Wisconsin residents subject to the Wisconsin Estate Tax imposed by Sec. 72.50 Wis. Stats. where 80% or more of the estate is within the taxable jurisdiction of the State of Wisconsin is always exactly 24% of the federal 1926 basic estate tax (i.e. 30% of 80%) reduced by 30% of death duties, if any, levied by other states. It is therefore directly measured by the federal tax, which in turn is based on the value of property both within and without the taxing jurisdiction of Wisconsin. *It is entirely unnecessary to even know what property the decedent had in Wisconsin in order to compute it, but merely the amount of death duties, if any, paid other states.*"

This statement is a correct exposition of the operation of the emergency tax and cannot be gainsaid. Similarly, the tables at page 13 of Appellant's brief cannot be impeached for want of accuracy, and the Appellee's criticism of them is clearly without a factual or mathematical basis.

The result, namely that the actual emergency tax is always 24% of the federal basic tax less death duties paid other states, is in no sense coincidental, that is, a unique event in the case at bar, but holds true in each and every application of the law regardless of the size, character or location of the estate, and has been unequivocally so shown in Appellant's brief.

CONCLUSION

It is therefore believed that the decision of the Supreme Court of Wisconsin cannot stand if the *Frick* case and other relevant opinions of this Court and the rationale underlying the limitation of a state's taxing power to subjects within its jurisdiction are also to stand.

Respectfully submitted,

A. W. SCHUTZ,

Counsel for Appellant.

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1949

No. ~~547~~ 20

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF
~~FRED A. MILLER,~~

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

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INDEX

SUBJECT INDEX

	Page
Statement opposing jurisdiction	1
Nature of the case	1
Statutes involved	5
Statement of facts	11
No substantial federal question is presented	13
The 30% additional emergency tax imposed by Section 72.74 Wisconsin Statutes 1943 is not directly geared to the federal estate tax	13
Factually there is no extraterritorial taxation in this case	15

TABLE OF CASES CITED

<i>Butler Bros. v. McColgan</i> , 315 U. S. 501, 62 S. Ct. 701, 86 L. Ed. 991	16
<i>Edison California Stores, Inc. v. McColgan</i> , 30 Calif. (2d) 472, 176 Pac. (2d) 697, 183 Pac. (2d) 16	16
<i>Estate of Miller</i> , 254 Wis. 24	2
<i>Frick v. Pennsylvania</i> , 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603	20

STATUTES CITED

Constitution of the United States, 14th Amendment
Wisconsin Statutes, 1943:

Sections 72.01 to 72.24	2, 3, 4
Sections 72.50 to 72.61	2, 3, 4, 9
Section 72.74	2, 3, 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 547

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF
FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

Pursuant to paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, the appellee State of Wisconsin files this statement opposing jurisdiction.

Nature of the Case

This is an appeal by Oscar F. Treichler, as executor of the Will of Fred A. Miller, deceased, from a judgment of the Supreme Court of the State of Wisconsin determining the amount of Wisconsin inheritance taxes imposed by the

statutes of Wisconsin in the estate of said Fred A. Miller, deceased. Said judgment was entered December 15, 1948, upon appeal by the State of Wisconsin from the County Court, Milwaukee County, State of Wisconsin.

The decision of the Supreme Court of Wisconsin, upon which said judgment was entered, is dated December 15, 1948, and reported in Estate of Miller, 254 Wis. 24 (Adv. Sh.) — N. W. (2d) —. Said judgment of the Supreme Court of Wisconsin reversed the order of the County Court for Milwaukee County, State of Wisconsin, determining the Wisconsin inheritance taxes payable in said estate at \$659,333.05, and remanded the case with directions to enter an order determining the amount of said taxes at \$745,399.11.

The taxes involved are imposed by Sections 72.01 to 72.24, inclusive, Sections 72.50 to 72.61, inclusive, and Section 72.74, of the Wisconsin statutes of 1943, which so far as here material remain the same in the present Wisconsin statutes.

The provisions of Sections 72.01 to 72.24 Wisconsin Statutes impose a tax at graduated rates on transfers of property by will or descent. The rates and exemptions depend upon the relationship to the decedent and the amount of tax is computed separately as to each beneficiary upon the value of the interest that such beneficiary receives. This tax is commonly known as the Wisconsin "normal inheritance tax". Section 72.23 provides that the proceeds from said tax go into the State treasury for the use of the State for the general expenses of the State government.

By the provisions of Sections 72.50 to 72.61, Wisconsin Statutes 1943, a tax is imposed which is denominated an estate tax, that is in addition to the "normal inheritance tax" imposed by Sections 72.01 to 72.24. Such estate tax is an amount equal to the difference between the aggregate of the death taxes paid to the State and 80% of the Fed-

eral basic estate tax, which 80% is allowable as a credit on said basic estate tax under the Internal Revenue Act of 1926,

The provisions of Section 72.74, Wisconsin Statutes, 1943, impose an emergency tax, specifically stated to be in addition to the "normal inheritance tax" imposed by Sections 72.01 to 72.24 and the "estate tax" imposed by Sections 72.50 to 72.61, which is "equal to 30% of" said taxes. This additional 30% emergency tax is imposed upon the transfers of property that are taxable under the provisions of said other sections and is specifically to raise revenue

... for relief purposes, rehabilitation of returning veterans of World War II, construction and improvement of state institutions and other state property and for post-war public works projects to relieve post-war unemployment . . .

A controversy arose over the proper application of the provisions of Section 72.74 Wisconsin Statutes imposing the additional 30% emergency tax. Appellant, the executor of the estate, contended that the tax imposed by said Section 72.74 should be included in State inheritance or death taxes deducted from the Federal estate tax credit in computing the Wisconsin "estate tax" under Sections 72.50 to 72.61. The appellant also contended that in any case where the Wisconsin "estate tax" imposed by Sections 72.50 to 72.61 is applicable and there is, as is true in this case, any property of the decedent that has a situs outside of the State of Wisconsin, the total Wisconsin inheritance taxes under all of said sections must be so computed as to not exceed the maximum of the Federal estate tax credit, otherwise the same are unconstitutional as the extraterritorial taxation by the State of Wisconsin.

Appropriate proceedings were had in the County Court for Milwaukee County, State of Wisconsin, the decedent

having died a resident of the County of Milwaukee and State of Wisconsin. An order was entered therein interpreting and applying the provisions of Sections 72.50 to 72.61 and Section 72.74 as including 30% of the amount of normal taxes under Sections 72.01 to 72.24 in the State inheritance and death taxes deducted from the maximum Federal estate tax credit in computing the Wisconsin estate tax imposed by Sections 72.50 to 72.61.

The State of Wisconsin duly appealed therefrom to the Supreme Court of the State of Wisconsin, contending that the lower court erroneously interpreted and applied said statutes and that the proper interpretation and application thereof is that the Wisconsin "normal inheritance tax" imposed by Sections 72.01 to 72.24 is to be first computed; then the Wisconsin "estate tax" pursuant to Sections 72.50 to 72.61 is next to be computed, and in the computation thereof only the total Wisconsin "normal inheritance taxes" are to be included along with inheritance or death taxes paid to any other States in the deduction from the amount of the Federal estate tax credit; and thereafter the 30% emergency tax provided in Section 72.74 is to be computed upon the total of said Wisconsin "normal inheritance tax" and the Wisconsin "estate tax".

The executor, the appellant here, duly filed a motion for review contending that the order below was erroneous because it should have interpreted and applied said provisions of the Wisconsin statutes so that the total Wisconsin inheritance taxes do not exceed the 80% Federal estate tax credit and that if construed to impose Wisconsin inheritance taxes in the amount as contended by the State such statutes imposed a tax upon the transfer of property which did not have a tax situs in the State of Wisconsin and therefore were violative of the due process clause of the 14th Amendment of the Constitution of the United States.

The Supreme Court of the State of Wisconsin construed and applied such statutes in accordance with the contention of the State of Wisconsin and held that under the facts in this case no such federal question is presented and that the Wisconsin statutes involved as so interpreted are valid. Accordingly it reversed the order of the County Court and remanded the case to such court for the entry of an order determining the inheritance taxes in accordance with the contention of the State of Wisconsin).

Statutes Involved

The provisions of sections 72.01 to 72.24 Wisconsin Statutes 1943 imposing the "normal" inheritance taxes, so far as here material, are as follows:

"72.01 Subjects liable. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation, except county, town or municipal corporations within the state, for strictly county, town or municipal purposes, and corporations of this state organized under its laws or voluntary associations organized solely for religious, charitable or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state, in the following cases, except as hereinafter provided:

"(1) WHILE A RESIDENT OF STATE. When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state.

"(2) NONRESIDENT'S PROPERTY WITHIN THE STATE.

"(3) TRANSFERS IN CONTEMPLATION OF DEATH. . . .

"(4) TRANSFER BEFORE OR AFTER PASSAGE OF ACT.

“(5) TRANSFER UNDER POWER OF APPOINTMENT. . . .

“(6) JOINT INTERESTS. . . .

“(7) INSURANCE PART OF ESTATE. . . .

“(8) BASIS OF TAX. The tax so imposed shall be upon the clear market value of such property at the rates hereinafter prescribed and only upon the excess of the exemptions hereinafter granted. Inheritance and estate taxes imposed by the government of the United States shall be deemed debts and shall be deducted in determining the value of the property transferred.

“(9) RECIPROCITY AS TO NONRESIDENT DECEDENTS.
• • • •

“72.02 Primary rates, where not in excess of twenty-five thousand dollars. When the property or any beneficial interest therein passes by any such transfer, where the amount of the property shall exceed in value the exemption specified in section 72.04, and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

“(1) TWO PER CENTUM, WHERE. [Close relationships set forth.]

“(3) SIX PER CENTUM, WHERE. [More remote relationships set forth.]

“(4) EIGHT PER CENTUM, WHERE. [Distant relationships set forth.]”

“72.03 Other rates, where in excess of twenty-five thousand dollars. The foregoing rates in section 72.02 are for convenience termed the primary rates. When the amount of the clear value of such property or interest exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

“(1) [Twice primary rates on \$25,000 to \$50,000.]

“(2) [Three times primary rates on \$50,000 to \$100,000.]

"(3) [Four times primary rates on \$100,000 to \$500,000.]

"(4) [Five times primary rates over \$500,000.]"

"72.035 Rate limit. The tax imposed by section 72.02 and section 72.03 shall not exceed 15 per cent of the property transferred to any beneficiary."

"72.04 Exemptions. The following exemptions from the tax, to be taken out of the first twenty-five thousand dollars, are hereby allowed:

"(1) [Transfers to municipal corporations and for religious, charitable, educational, etc. purposes.]

"(2) [\$15,000 to widow, \$5,000 to husband, and \$2,000 to each beneficiary within close relationship in the 2% bracket]

"(4) [\$250 to each beneficiary within more remote relationship in 6% bracket]

"(5) [\$100 to each beneficiary within distant relationship in 8% bracket]

"(6) [Exemption of resident's tangible personal property located out of the state]

"(7) [Requests for burial lot, etc.]

"(8) Whenever a tax may be due from the estate, or the beneficiaries therein, of any resident or nonresident decedent, upon the transfer of any property, when the property or estate left by such decedent is partly within and partly without this state, or upon any stocks, bonds, mortgages or other securities representing property or estate partly within and partly without the state, any beneficiary of such estate shall be entitled to deduct only a proportion of his share of the debts, expenses of administration, and of his Wisconsin exemption, equal to the proportion which his interest in the property within the state or within its jurisdiction bears to his entire interest in such estate."

"72.12 County Courts. (1) Jurisdiction. The county court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under the inheritance tax laws, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of the inheritance tax laws and to do any act in relation thereto authorized by law to be done by a county court in other matters or proceedings coming within its jurisdiction; and if two or more county courts shall be entitled to exercise any such jurisdiction, the county court first acquiring jurisdiction hereunder, shall retain the same to the exclusion of every other county court.

"(2) . . .

"(3) . . .

"72.15 Hearing and determination of tax. (1) . . .

.

"(10) ORDER OF COUNTY COURT DETERMINING VALUE OF ESTATES AND LIABILITY TO TAX. Upon the determination by the county court of the value of any estate which is taxable under the inheritance tax laws, and of the tax to which it is liable, an order shall be entered by the court determining the same, which order shall include a statement of (a) the date of death of the decedent, (b) the gross value of the real and personal property of such estate, stating the principal items thereof, (c) the deductions therefrom allowed by the court, (d) the names and relationship of the persons entitled to receive the same, with the amount received by each, (e) the rates and amounts of inheritance tax for which each such person is liable, and the total amount of tax to be paid, (f) a statement of the amount of interest or penalty due, if any. Such order shall be in the form prescribed by the department of taxation. A copy of the same shall be delivered or mailed

to the county treasurer, the state treasurer, and the department of taxation, and no final judgment shall be entered in such estates until due proof is filed with the court that such copies have been so delivered or mailed.

... .

"72.23 Taxes; payment; application. All taxes levied and collected under sections 72.01 to 72.24, inclusive, less any expenses of collection, the percentage to be retained by the county, and the deduction authorized under sections 72.01 to 72.24, inclusive, shall be paid into the treasury of the state for the use of the state, and shall be applicable to the expenses of the state government and to such other purposes as the legislature may by law direct."

The provisions of sections 72.50 to 72.61, Wisconsin Statutes 1943 imposing the state estate tax, so far as here material, are as follows:

"72.50 Tax imposed. In addition to the taxes imposed by sections 72.01 to 72.26, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the United States revenue act of 1926, and amendments thereto, where the decedent at the time of his decease was a resident of this state. The amount of said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding eighty per cent, allowable under said United States revenue act, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of the estate of the decedent had sections 72.50 to 72.61 not been enacted. The tax imposed herein shall be collected by the several county treasurers for

the use of the state, and shall be accounted for and paid into the state treasury within the time and in the manner specified in section 72.19."

.

"72.61 Provisions applicable. The provisions of chapter 72, relating to the tax on inheritances and transfers, shall apply to the taxes imposed by sections 72.50 to 72.61 in so far as the same are applicable and not in conflict with the provisions hereof."

The provisions of section 72.74 Wisconsin Statutes 1943 imposing the 30% additional emergency inheritance tax, so far as here material, are as follows:

"(2) In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61 of the statutes, an emergency tax for relief purposes, rehabilitation of returning veterans of World War II, construction and improvements at state institutions and other state property and for post-war public works projects to relieve post-war unemployment is hereby imposed upon all transfers of property which are taxable under the provisions of said sections and which are made subsequent to March 27, 1935 and prior to July 1, 1945 which said tax shall be equal to 30 per cent of the tax imposed by said sections.

"(3) The emergency tax upon transfers of property imposed in subsection (2) shall be administered, assessed, collected and paid in the same manner, at the same time, and subject to the same regulations that are applicable, respectively, as provided for the administration, assessment, collection and payment of the taxes imposed in chapter 72 of the statutes; provided, however, that the entire amount of said emergency tax shall be collected and paid into the general fund.

"(4) . . .

"(5) . . ."

Statement of Facts

Fred A. Miller died testate on December 19, 1943, a resident of Milwaukee County, State of Wisconsin. His will was duly admitted to probate in the County Court for Milwaukee County, State of Wisconsin. He left a total estate of \$7,849,714.84, of which 87.52% or \$6,869,778.61 had a tax situs in the State of Wisconsin and only 12.48% or \$979,936.23 was located in and subject to taxation in the states of Illinois and Florida. Because of its size the death taxes imposed by the United States amounted to \$3,076,131.18.

After allowance of deductions, including the federal estate taxes, there was a net estate of \$3,803,378.42 subject to Wisconsin inheritance taxes. The allowance of deductions was on a pro rata basis as provided in section 72.04 (8) Wisconsin Statutes 1943. Such deductions totalling \$3,066,400.19 included \$2,690,999.56 as 87.48% of the total federal estate taxes of \$3,076,131.18. [The difference between this 87.48% and the 87.52% arises out of adjustments not here material.]

At the time of the decedent's death, sections 72.01 to 72.24, Wisconsin Statutes 1943 imposing the Wisconsin "normal inheritance tax", sections 72.50 to 72.61 Wisconsin Statutes 1943 imposing the Wisconsin "estate tax", and section 72.74 Wisconsin Statutes 1943 imposing an additional 30% emergency inheritance tax, were all in effect and applicable.

On the net estate of \$3,803,378.42 subject to Wisconsin inheritance taxation the total "normal" inheritance taxes computed in accordance with and under sections 72.01 to 72.24 Wisconsin Statutes 1943, amounts to \$220,682.12.

The 80% of the *basic* federal estate tax, which is allowable under the Internal Revenue Act of 1926 as a credit on the federal basic estate tax, amounts to \$630,709.62. Inheritance taxes of \$35,616.26 were paid to the State of Illinois,

and estate taxes of \$21,709.45 were paid to the State of Florida. The total of said Wisconsin "normal" inheritances, the Illinois inheritance taxes and the Florida estate taxes is \$278,007.83. The 80% allowable Federal estate tax credit thus exceeds said total state taxes by \$352,701.79. Under the provisions of sections 72.50 to 72.61 Wisconsin Statutes 1943 the estate is therefore subject to the Wisconsin "estate" tax imposed by said sections and the amount of such tax is \$352,701.79.

Under the provisions of section 72.74 Wisconsin Statutes 1943 the estate is also subject to a Wisconsin emergency inheritance tax "equal to 30%" of said Wisconsin "normal" inheritance tax and said Wisconsin "estate" tax. Such emergency tax so calculated amounts to \$172,015.20. The total of such Wisconsin taxes is thus \$745,399.11. The computation of said taxes is as follows:

TABLE "A"

(1) Wisconsin Normal Inherit. Taxes	\$220,682 12
(2) Wisconsin Estate Tax:—	
80% of U. S. Estate Tax	\$630,709 62
Less: (a) Wis. Normal Taxes	
(1) above	\$220,682 12
(b) Ill. Inherit. Taxes	35,616 26
(c) Fla. Inherit. Taxes	21,709 45
Total State Taxes	278,007 83
Difference is Wis. Estate Tax	352,701.79
(3) Wisconsin Emergency Tax:—	
Wis. Normal Taxes (1) above	220,682 12
Wis. Estate Tax (2) above	352,701 79
Total	573,383 91
Emerg. Tax is 30%	172,015 20
Total Wisconsin Inheritance Taxes	<u>\$745,399.11</u>

Such computation is in accordance with the interpretation and application given to the applicable Wisconsin statutes by the Supreme Court of Wisconsin and its remand directs the County Court for Milwaukee County to determine the Wisconsin inheritance taxes payable in the estate.

It is from the judgment of the Supreme Court of Wisconsin to this effect that the appellant executor brings this appeal.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

Jurisdiction is asserted by the appellant upon the claim that section 72.74 Wisconsin Statutes 1943 imposes the 30% additional emergency tax extraterritorially and therefore is violative of the due process provision of the 14th Amendment to the Constitution of the United States. This assertion is based solely upon appellant's proposition that this 30% emergency tax is "directly geared" to the federal estate tax, which is laid upon property both within and without the State of Wisconsin, and therefore it is imposed upon property outside the taxing jurisdiction of the State of Wisconsin.

1. *The 30% additional emergency tax imposed by Section 72.74 Wisconsin Statutes 1943 is not directly geared to the federal estate tax.*

This is self-evident. On the contrary it is computed at 30% of the amount of two other independent taxes. By its express terms this emergency tax is an amount "equal to 30 per cent" of the amount of the "normal" Wisconsin inheritance tax imposed by sections 72.01 to 72.24 and the Wisconsin "estate" tax imposed by sections 72.50 to 72.61.

Both the "normal" inheritance tax and the Wisconsin estate tax are computed and imposed independently of this emergency tax. No question is raised as to the validity of those taxes and they must therefore stand as admittedly valid. They are computable and payable regardless of the existence of this emergency tax. Such taxes are payable in the same amount even though this 30% emergency tax did not exist. These two other taxes were in effect and operation before the 30% additional

emergency tax was adopted, and the 30% additional tax is an emergency tax whose repeal would in no way affect the amount of said other taxes.

It is not until and after the amount of said other taxes is computed and fixed that this emergency tax is laid and it is computed at the amount which is "equal to" 30% of the amount of such other taxes. In other words, such other independent taxes are taken at their calculated amounts and the emergency tax is figured thereon without any reference to how such amounts were calculated. They are taken as a fixed amount of taxes in dollars and cents and then the 30% figure is applied to such dollars and cents amounts to obtain the amount of the emergency tax. That this result may bear some relationship, mathematical or otherwise, to the amount of the federal estate tax credit or even to the amount of the federal estate tax is purely coincidental.

The statement in appellant's jurisdictional statement that the 30% additional emergency inheritance tax imposed by section 72.74 is always 30% of the federal estate tax credit and 24% of the federal basic estate tax is both incorrect and misleading. The tables submitted in connection with such statement do not state the true picture. Such tables are correct and the calculations therein are applicable ~~only~~ where the entire property of the decedent is in the State of Wisconsin and the "normal" Wisconsin inheritance taxes under sections 72.01 to 72.24 are less than the 80% federal estate tax credit. Where that is true then obviously no question of extraterritorial taxation can possibly arise. Accordingly the examples in said tables prove nothing that is relevant to this case.

Furthermore, the appellant makes another erroneous statement where, in summarizing the Wisconsin inheritance tax laws, it is stated that the Wisconsin "estate" tax of sections 72.50 to 72.61 is "levied upon the whole estate of

the decedent". There is no such language in those sections and such tax, being grounded upon jurisdiction to tax because of domicile of the decedent, is limited to and levied only upon the Wisconsin estate of the decedent.

This Wisconsin "estate" tax does not accrue in by far the majority of Wisconsin estates. It is the exceptional case in which it is applicable at all. This arises because, except where the estate is in excess of approximately \$3,000,000 or where there are very peculiar circumstances, the "normal" Wisconsin inheritance tax computed under Sections 72.01 to 72.24 always exceeds the amount of the Federal estate tax credit of 80% of the Federal basic tax. The peculiar circumstances, and they are quite rare, are (1) where the estate is divided among a very large number of beneficiaries, (2) where successive transfers take place to a widow and then to the children within 6 years and credit is allowable for the tax paid by the widow, and (3) where certain bequests to charitable, educational, etc. purposes are exempt under the Wisconsin law but not under the Federal estate tax.

It is thus abundantly clear that the 30% additional emergency tax of Section 72.74 is not geared to the Federal estate tax but to the amount of the "normal" Wisconsin inheritance tax of Sections 72.01 to 72.24 and the amount of the Wisconsin "estate" tax of Sections 72.50 to 72.61, both of which taxes are imposed solely upon the Wisconsin estate of the decedent and are not laid upon any property other than that which is within the State of Wisconsin.

2. Factually there is no extraterritorial taxation in this case.

The 30% additional emergency tax is not laid extraterritorially by the provisions of Section 72.74 nor is it applied in this case so as to tax any property other than that portion of the decedent's estate which is within the

State of Wisconsin. The language of subsection (2) is that this 30% additional tax "is hereby imposed upon all transfers of property which are taxable under the provisions of" Sections 72.01 to 72.74 and Sections 72.50 to 72.61. This language makes it clear that this 30% additional tax is definitely limited to the same property, namely the Wisconsin property, that is taxed by the "normal" Wisconsin inheritance tax and the Wisconsin estate tax.

Appellant notes that the total of the Wisconsin inheritance taxes in this case exceeds the amount of the Federal estate tax credit of 80% Federal basic estate tax and that in the absence of this 30% additional emergency tax the total of the Wisconsin inheritance taxes would not exceed such Federal credit. Appellant says that because it is the imposition of this 30% additional emergency tax which makes the total Wisconsin taxes exceed the Federal credit, therefore such 30% additional emergency operates here to tax property which is outside of the State of Wisconsin. But, that is not enough to carry the burden which the appellant assumes when he attacks the validity of this tax.

The situation here is comparable to the instance of where one attacks a State income tax apportionment formula that is used in allocation of the income from the transaction of multi-state business. In the cases involving State income tax apportionments the test is whether the State statute is fairly calculated to assign to that State that portion of the net income reasonably attributable to business done there. If so, the statute is valid and no constitutional question exists. The burden is on him who attacks the statute as taxing extraterritorially. He must carry that burden by showing by "clear and cogent evidence" that the statute results in extraterritorial values being taxed. *Butler Bros. v. McColgan* (1942), 315 U. S. 501, 62 S. Ct. 701, 86 L. Ed. 991; *Edison California Stores, Inc. v. McColgan* (1947), 30 Calif. (2d) 472, 176 Pac. (2) 697, 183 Pac.

(2) 16. There is no clear and cogent evidence in this case that the 30% additional emergency tax of Section 72.74 results in extraterritorial taxation. Rather the facts are to the contrary.

In the first place the mere fact that the total of the Wisconsin inheritance taxes exceeds the Federal estate tax credit cannot render such Wisconsin inheritance taxes invalid. For if that were true then there would be invalidity in the Wisconsin inheritance taxes in almost all Wisconsin estates. As previously noted the amount of the "normal" Wisconsin inheritance taxes under Sections 72.01 to 72.24 exceeds any Federal credit allowable in all but the very large estates of over about \$3,000,000 and in the rare case where special circumstances may result in the Wisconsin "normal" tax being less than the Federal credit.

But, clearly the mere mathematical fact of the Wisconsin "normal" taxes being in excess of the Federal estate tax credit does not render such "normal" taxes invalid as taxing extraterritorial values. This demonstrates that the mathematical result that the *total* Wisconsin inheritance taxes exceed the Federal tax credit does not establish or show extraterritorial taxation.

Furthermore, it is clear that the Wisconsin "estate" tax of Sections 72.50 to 72.61 would be payable and in the same amount, which is also true of the "normal" inheritance taxes of Sections 72.01 to 72.24, regardless of the existence of this 30% emergency tax. The validity of such other taxes is not questioned as operating to tax extraterritorially. It thus logically follows that the admeasuring of the additional emergency tax at a percentage of the amount of such other admittedly valid taxes does not and cannot of itself operate as extraterritorial taxation.

In addition, in instances where the amount of the "normal" Wisconsin inheritance taxes under Sections 72.01 to

72.24 exceeds the Federal tax credit, which is practically all Wisconsin estates, not only is it true that the fact the normal taxes do exceed the Federal credit does not make the "normal" tax invalid or extraterritorial taxation to the extent of such excess, but the 30% additional emergency tax is applied to such total Wisconsin "normal" inheritance taxes. In such cases the amount of the emergency tax likewise is in excess of the Federal tax credit. But, clearly that is of no moment and it does not cast any doubt upon the validity of the emergency tax in those cases. The 30% emergency tax in those cases not only itself is beyond the Federal tax credit but it is computed at a percentage of a previously computed tax which exceeds the Federal tax credit. In this same connection it may be noted that in many Wisconsin estates the total of the Wisconsin "normal" inheritance taxes under Sections 72.01 to 72.24 not only exceeds the Federal tax credit but exceeds the total of all Federal death taxes. Yet, the 30% emergency tax is equally applicable and valid in such cases.

The foregoing shows that the mere fact that the total of the Wisconsin inheritance taxes is in excess of the amount of the Federal estate tax credit will not support appellant's assertion of extraterritorial taxation. Therefore if there is to be any support for this charge it must be found in a consideration of the facts from a mathematical point of view. But the facts rather than sustaining it clearly show to the contrary.

The net Wisconsin estate of the decedent which is subjected to the Wisconsin taxes is \$3,803,378.42 which is only 48.2% of the entire gross estate of \$7,849,714.84. Such Wisconsin net estate is arrived at by taking the total of the property located in Wisconsin which is \$6,869,778.61 and subtracting therefrom the allowable deductions of debts, expenses of last illness and burial, cost of administration

and federal estate taxes. These were all deducted on a prorata basis of 87.48%. [The very slight difference between this and 87.52% arises out of adjustments in valuations not here material.] Thus the total of all federal estate taxes (not just the federal basic estate tax) of \$3,076,131.19 was allowed and included in such deductions at \$2,690,929.56 as 87.48% of the total tax. This reduced the Wisconsin net estate by the full proportionate share of the total federal taxes referable thereto. Such deduction allowances, and especially the allowance of a deduction for federal estate taxes, are purely matters of legislative grace. The State of Wisconsin is not required to make any such allowance but does so as a matter of reducing its taxation to an imposition on the net value actually transmitted to the beneficiaries. As previously stated the effect of these deductions is to reduce the net estate subjected to taxation in Wisconsin to \$3,803,378.42 or only 48½% of the entire property of \$7,849,714.84 left by the decedent; of which total property only \$979,936.23 or 12½% was outside the State of Wisconsin.

If instead of deducting the \$3,066,400.19, which is 87½% of the allowable items, from the Wisconsin gross estate of \$6,869,778.61, the allowable items were subtracted at 100% or \$3,505,258.50 from the total gross estate everywhere of \$7,849,714.84, the result would be \$4,344,456.34 as the total net estate everywhere. Applying to this last figure the 87½ percentage for the Wisconsin property produces \$3,803,378.42 which is the amount of the net estate in Wisconsin that is subjected to its taxes. This shows that, in the design of the Wisconsin inheritance taxes and their application to this estate, the objective is to confine their imposition to property within the state and they have been so applied here.

This result is found as a fact by the Supreme Court of Wisconsin where it notes that more than 86% of the property was admittedly located in Wisconsin. The accurate percentage is 87.52%. The federal estate tax credit which enters into the Wisconsin estate tax imposed by sections 72.50 to 72.61 is however only 80% of the federal basic estate tax. The other 20% more than absorbs, or is attributable on any mathematical basis to, the 12.48% of the gross estate which is outside of Wisconsin.

It is also significant as respects this Wisconsin estate tax that in its calculation there is deducted out the total death taxes paid the States of Illinois and Florida. This shows that such tax is levied only in respect of property situated in the State of Wisconsin.

The instant situation is in no way comparable to *Frick v. Pennsylvania*, (1925) 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603. The Pennsylvania statute there involved expressly laid the taxes on the transfer of the property by a resident decedent whether it was in that state or elsewhere. No deduction was made for any taxes paid to the United States or to any other state. In computing the tax the value of tangible property located in New York and Massachusetts was admittedly included in the gross estate upon which the Pennsylvania tax was calculated. In that case there thus was a clear and express endeavor by the State of Pennsylvania to directly tax property which concededly was located in other states. The tax was applied to and calculated upon that property directly. Here the Wisconsin statutes do not attempt to impose taxes upon anything other than the property which is located in the State of Wisconsin. The language of the statutes on the contrary expressly restricts the taxes to property within the state. The values of property outside the State of Wisconsin are excluded from the value upon which the taxes are calculated.

Furthermore, deduction is made for federal estate taxes in arriving at the value of the estate upon which such taxes are calculated, and in computing the Wisconsin estate tax full deduction is made for the taxes paid to other states. The dissimilarity between the two cases is readily apparent.

From the foregoing it appears that no substantial federal question is here presented and that the Supreme Court of Wisconsin so held correctly.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1949

No. 20

**OSCAR F. TREICHLER, Executor
of the Estate of Fred A. Miller,**

Appellant,

vs.

STATE OF WISCONSIN.

Appeal from the Supreme Court of the State of Wisconsin

Brief of Appellee

**THOMAS E. FAIRCHILD,
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INDEX AND SYNOPSIS OF ARGUMENT

	PAGE
NATURE OF THE CASE	1-3
STATUTES INVOLVED	3-9
STATEMENT OF THE CASE	10-12
SUMMARY OF ARGUMENT	

I. THE WISCONSIN INHERITANCE TAXES DO NOT OPERATE TO IMPOSE ANY TAX EXTRA-TERRITORIALLY	13-14
---	-------

ARGUMENT

I. THE WISCONSIN INHERITANCE TAXES DO NOT OPERATE TO IMPOSE ANY TAX EXTRA-TERRITORIALLY	14-31
---	-------

A. Appellant Does Not Carry His Burden of Showing Extraterritorial Impact of the Taxes Here 15-18

B. Factually There Is No Extraterritorial Taxation in This Case 18-22 |

C. That the Wisconsin Inheritance Taxes Exceed the Federal Estate Tax Credit Does Not Establish That They Are Extraterritorial in Effect 23-24

D. Were the Entire Estate of the Decedent in Wisconsin the Total Wisconsin Inheritance Taxes Would be Larger 25 |

E. Measurement of the Tax by Factors Outside the States Does Not of Itself Render a Tax Extraterritorial 27-28 |

F. The Pattern of the Wisconsin Inheritance Tax Statutes Clearly is the Imposition of Taxes Only on the Property Within its Taxing Jurisdiction 29-31 |

II. THE 30% ADDITIONAL EMERGENCY TAX IMPOSED BY SECTION 72.74 WISCONSIN STATUTES 1943 IS NOT DIRECTLY GEARED TO THE FEDERAL ESTATE TAX	32-34
--	-------

CONCLUSION	34
------------------	----

CASES CITED

Butler Bros. v. McColgan, (1942) 315 U. S. 501, 62 S. Ct. 701, 86 L. ed. 991	17-18
Edison California Stores, Inc. v. McColgan, (1947) 30 Calif. (2d) 472, 176 Pac. (2) 697, 183 Pac. (2) 16	18
Frick v. Pennsylvania, (1925) 268 U. S. 473, 45 S. Ct. 603, 69 L. ed. 1058	27
Great Atlantic & Pacific Tea Co. v. Grosjean, (1937) 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 1193	27
Maxwell v. Bugbee, (1919) 250 U. S. 525, 40 S. Ct. 2, 63 L. ed. 1124	27
State of Wisconsin v. J. C. Penney Co., (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267	27

STATUTES CITED

PAGE

Wisconsin Statutes 1943

Ch. 72	30
Sec. 72.01-72.24 2, 3, 10, 11, 23, 24, 29, 30, 31, 32, 33, 34	
72.01-72.74	18
72.01	3
(1)	4
(2)	4
(8)	4
(9)	4
72.02	5
72.03	5
72.035	5
72.04	5
(8)	6, 10, 19
72.12	6
(1)	6-7
72.15	7
(10)	7
72.23	8
72.24	8, 33
72.50-72.61	
2, 8, 10, 11, 18, 20, 23, 29, 30, 31, 32, 33, 34	
72.50	8
72.61	9, 20, 30

	PAGE
72.74	2, 9, 10, 11, 18, 29, 30, 31, 32, 33, 34
(2)	9, 18
(3)	9

LAWS 1931

Ch. 426	29
---------------	----

LAWS 1933

Ch. 363, Sec. 3	30
-----------------------	----

LAWS 1943

Ch. 367, Sec. 3	30
-----------------------	----

Supreme Court of the United States

October Term, 1949

No. 20

OSCAR F. TREICHLER, Executor
of the Estate of Fred A. Miller,

Appellant,

vs.

STATE OF WISCONSIN.

Appeal from the Supreme Court of the State of Wisconsin

Brief of Appellee

The appeal is by the executor of the will of Fred A. Miller, deceased, from a judgment of the Supreme Court of the State of Wisconsin determining the amount of Wisconsin inheritance taxes payable in the estate of said decedent. (R. 9-15, Fol. 26-34)

NATURE OF THE CASE

The decedent died testate, a resident of the State of Wisconsin, leaving a total estate of \$7,849,714.84 of which \$6,869,778.61, or 87.52%, had a tax situs in the State of

Wisconsin and \$979,936.23, or 12.48%,^{*} was located outside the State of Wisconsin in the States of Illinois and Florida and subjected to succession taxes by those states.

In the computation of the Wisconsin inheritance taxes there was allowance of deductions that included federal death taxes, which reduced the net estate subjected to Wisconsin inheritance taxes down to \$3,803,378.42. Such deductions were apportioned on the basis of the ratio of the property within Wisconsin to the total estate and the amount allowed in Wisconsin was \$3,066,400.19. This included \$2,690,999.56 of the total federal death taxes of \$3,076,131.18.

The total Wisconsin inheritance taxes computed in accordance with the decision of the Supreme Court of Wisconsin here under review, amount to \$745,399.11. The Illinois inheritance taxes amounted to \$35,616.26 and the Florida estate taxes were \$21,709.45.

Sections 72.01 to 72.24 of the Wisconsin Statutes impose what is commonly called a "normal" inheritance tax computed separately on the value of the interest of each beneficiary at graduated and progressive rates. Sections 72.50 to 72.61 of the Wisconsin Statutes impose what is sometimes called the "estate" tax, which is in the amount equal to the excess of the 80% federal basic tax credit over all death taxes paid to all states. Both said "normal" inheritance tax and said "estate" tax are imposed for and the proceeds used for general state revenue purposes. Then, section 72.74 of the Wisconsin Statutes imposes an "additional emergency" inheritance tax for relief purposes, rehabilitation of World War II veterans, construction and improvement of state institutions and other state property, and post-war public works projects to relieve post-war

unemployment. This "emergency" tax was initially imposed for two years only but has been successively extended biennially by the legislature. It is expressly imposed upon the transfers of property which are taxable under the "normal" inheritance tax and the "estate" tax and is rated at 30% of the amount of said taxes and in addition thereto.

The contention of the appellant is that, because the "estate" tax is computed in reference to the 80% federal basic death tax credit, the imposition of the "additional emergency tax" at 30% of the total "normal" inheritance taxes and the "estate" tax makes it a tax on the property that was outside the State of Wisconsin and it therefore is invalid as extra-territorial taxation.

STATUTES INVOLVED

The provisions of sections 72.01 to 72.24 Wisconsin Statutes 1943 imposing the "normal" inheritance taxes, so far as here material, are as follows:

"72.01 Subjects liable. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation, except county, town or municipal corporations within the state, for strictly county, town or municipal purposes, and corporations of this state organized under its laws or voluntary associations organized solely for religious, charitable or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state, in the following cases, except as hereinafter provided:

"(1) WHILE A RESIDENT OF STATE. When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state.

"(2) NONRESIDENT'S PROPERTY WITHIN THE STATE. When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a nonresident of the state at the time of his death.

"(3) TRANSFERS IN CONTEMPLATION OF DEATH. . . .

"(4) TRANSFER BEFORE OR AFTER PASSAGE OF ACT. . . .

"(5) TRANSFER UNDER POWER OF APPOINTMENT. . . .

"(6) JOINT INTERESTS. . . .

"(7) INSURANCE PART OF ESTATE. . . .

"(8) BASIS OF TAX. The tax so imposed shall be upon the clear market value of such property at the rates hereinafter prescribed and only upon the excess of the exemptions hereinafter granted. Inheritance and estate taxes imposed by the government of the United States shall be deemed debts and shall be deducted in determining the value of the property transferred.

"(9) RECIPROCITY AS TO NONRESIDENT DECEDENTS. Personal property of a nonresident decedent made taxable under this chapter, except tangible personal property having an actual situs in this state, shall not be subject to the tax so imposed if a like exemption was allowed at the time of death of such decedent by the laws of the state, territory or district of the decedent's residence in favor of residents of this state."

"72.02 Primary rates, where not in excess of twenty-five thousand dollars. When the property or any beneficial interest therein passes by any such transfer, where the amount of the property shall exceed in value the exemption specified in section 72.04, and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

"(1) TWO PER CENTUM, WHERE. [Close relationships set forth.]

"(3) SIX PER CENTUM, WHERE. [More remote relationships set forth.]

"(4) EIGHT PER CENTUM, WHERE. [Distant relationships set forth.]"

"72.03 Other rates, where in excess of twenty-five thousand dollars. The foregoing rates in section 72.02 are for convenience termed the primary rates. When the amount of the clear value of such property or interest exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

"(1) [Twice primary rates on \$25,000 to \$50,000.]

"(2) [Three times primary rates on \$50,000 to \$100,000.]

"(3) [Four times primary rates on \$100,000 to \$500,000.]

"(4) [Five times primary rates over \$500,000.]"

"72.035 Rate limit. The tax imposed by section 72.02 and section 72.03 shall not exceed 15 per cent of the property transferred to any beneficiary."

"72.04 Exemptions. The following exemptions from the tax, to be taken out of the first twenty-five thousand dollars, are hereby allowed:

"(1) [Transfers to municipal corporations and for religious, charitable, educational, etc. purposes]

"(2) [\$15,000 to widow, \$5,000 to husband, and \$2,000 to each beneficiary within close relationship in the 2% bracket]

"(4) [\$250 to each beneficiary within more remote relationship in 6% bracket]

"(5) [\$100 to each beneficiary within distant relationship in 8% bracket]

"(6) [Exemption of resident's tangible personal property located out of the state]

"(7) [Requests for burial lot, etc.]

"(8) Whenever a tax may be due from the estate, or the beneficiaries therein, of any resident or nonresident decedent, upon the transfer of any property, when the property or estate left by such decedent is partly within and partly without this state, or upon any stocks, bonds, mortgages or other securities representing property or estate partly within and partly without the state, any beneficiary of such estate shall be entitled to deduct only a proportion of his share of the debts, expenses of administration, and of his Wisconsin exemption, equal to the proportion which his interest in the property within the state or within its jurisdiction bears to his entire interest in such estate.

"72.12 County Courts. (1) Jurisdiction. The county court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under the inheritance laws, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of the inheritance tax laws and to do any act in relation thereto authorized by law to be done by a county court in other

matters or proceedings coming within its jurisdiction; and if two or more county courts shall be entitled to exercise any such jurisdiction, the county court first acquiring jurisdiction hereunder, shall retain the same to the exclusion of every other country court.

"(2) . . .

"(3) . . ."

"72.15 Hearing and determination of tax. (1)

. . .

" . . .

"(10) ORDER OF COUNTY COURT DETERMINING VALUE OF ESTATES AND LIABILITY TO TAX. Upon the determination by the county court of the value of any estate which is taxable under the inheritance tax laws, and of the tax to which it is liable, an order shall be entered by the court determining the same, which order shall include a statement of (a) the date of death of the decedent, (b) the gross value of the real and personal property of such estate, stating the principal items thereof, (c) the deductions therefrom allowed by the court, (d) the names and relationship of the persons entitled to receive the same, with the amount received by each, (e) the rates and amounts of inheritance tax for which each such person is liable, and the total amount of tax to be paid, (f) a statement of the amount of interest or penalty due, if any. Such order shall be in the form prescribed by the department of taxation. A copy of the same shall be delivered or mailed to the county treasurer, the state treasurer, and the department of taxation, and no final judgment shall be entered in such estates until due proof is filed with the court that such copies have been so delivered or mailed.

" . . ."

"72.23 Taxes; payment; application. All taxes levied and collected under sections 72.01 to 72.24, inclusive, less any expenses of collection, the percentage to be retained by the county, and the deduction authorized under sections 72.01 to 72.24, inclusive, shall be paid into the treasury of the state for the use of the state, and shall be applicable to the expenses of the state government and to such other purposes as the legislature may by law direct."

The provisions of sections 72.50 to 72.61, Wisconsin Statutes 1943 imposing the state estate tax, so far as here material, are as follows:

"72.50 Tax imposed. In addition to the taxes imposed by sections 72.01 to 72.26, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the United States revenue act of 1926, and amendments thereto, where the decedent at the time of his decease was a resident of this state. The amount of said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding eighty per cent, allowable under said United States revenue act, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of the estate of the decedent had sections 72.50 to 72.61 not been enacted. The tax imposed herein shall be collected by the several county treasurers for the use of the state, and shall be accounted for and paid into the state treasury within the time and in the manner specified in section 72.19."

72.61 Provisions applicable. The provisions of chapter 72, relating to the tax on inheritances and transfers, shall apply to the taxes imposed by sections 72.50 to 72.61 in so far as the same are applicable and not in conflict with the provisions hereof."

The provisions of section 72.74 Wisconsin Statutes 1943 imposing the 30% additional emergency inheritance tax, so far as here material, are as follows:

"(2) In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61 of the statutes, an emergency tax for relief purposes, rehabilitation of returning veterans of World War II, construction and improvements at state institutions and other state property and for post-war public works projects to relieve post-war unemployment is hereby imposed upon all transfers of property which are taxable under the provisions of said sections and which are made subsequent to March 27, 1935 and prior to July 1, 1945 which said tax shall be equal to 30 per cent of the tax imposed by said sections.

"(3) The emergency tax upon transfers of property imposed in subsection (2) shall be administered, assessed, collected and paid in the same manner, at the same time, and subject to the same regulations that are applicable, respectively, as provided for the administration, assessment, collection and payment of the taxes imposed in chapter 72 of the statutes; provided, however, that the entire amount of said emergency tax shall be collected and paid into the general fund.

"(4) * * * [Separability clause]

"(5) * * * [Procedure for recovery of erroneous tax]"

STATEMENT OF THE CASE

Fred A. Miller died testate on December 19, 1943, a resident of Milwaukee County, State of Wisconsin. His will was duly admitted to probate in the County Court for Milwaukee County, State of Wisconsin. He left a total estate of \$7,849,714.84, of which 87.52% or \$6,869,778.61 had a tax situs in the State of Wisconsin and only 12.48% or \$979,936.23 was located in and subject to taxation in the states of Illinois and Florida. Because of its size the death taxes imposed by the United States amounted to \$3,076,131.18, which includes both the basic and additional federal estate taxes.

After allowances of deductions, including the federal estate taxes, there was a net estate of \$3,803,378.42 subject to Wisconsin inheritance taxes. The allowance of deductions was on a pro rata basis as provided in section 72.04 (8) Wisconsin Statutes 1943. Such deductions totalling \$3,066,400.19 included \$2,690,999.56 as 87.48% of the total federal estate taxes of \$3,076,131.18. [The difference between this 87.48% and the 87.52% arises out of adjustments which are not in dispute and have no materiality here.]

At the time of the decedent's death sections 72.01 to 72.24, Wisconsin Statutes of 1943 imposing the Wisconsin "normal" inheritance tax, sections 72.50 to 72.61 Wisconsin Statutes of 1943 imposing the Wisconsin "estate" tax, and section 72.74 Wisconsin Statutes of 1943 imposing an "additional 30% emergency" inheritance tax, were all in effect and applicable.

On the net estate of \$3,803,378.42 subject to Wisconsin inheritance taxation the total "normal" inheritance taxes

computed in accordance with and under sections 72.01 to 72.24 Wisconsin Statutes 1943, amounts to \$220,682.12.

The 80% of the basic federal estate tax, which is allowable under the Internal Revenue Act of 1926 as a credit on the federal basic estate tax, amounts to \$630,709.62. Inheritance taxes of \$35,616.26 were paid to the State of Illinois, and estate taxes of \$21,709.45 were paid to the State of Florida. The total of said Wisconsin "normal" inheritances, the Illinois inheritance taxes and the Florida estate taxes is \$278,007.83. The 80% allowable federal estate tax credit thus exceeds said total state taxes by \$352,701.79. Under the provisions of sections 72.50 to 72.61 Wisconsin Statutes 1943 the estate is therefore subject to the Wisconsin "estate" tax imposed by said sections and the amount of such tax is \$352,701.79.

Under the provisions of section 72.74 Wisconsin Statutes 1943 the estate is also subject to a Wisconsin "emergency" inheritance tax equal to 30% of said Wisconsin "normal" inheritance tax and said Wisconsin "estate" tax. Such "emergency" tax so calculated amounts to \$172,015.20. The total of such Wisconsin taxes is thus \$745,399.11. The computation of said taxes is as follows:

TABLE "A"

(1) Wisconsin Normal Inheritance Taxes	\$220,682.12
(2) Wisconsin Estate Tax:—	
80% of U. S. Estate Tax	\$630,709.62
Less:—	
(a) Wis. Normal Taxes	
(1) above	\$220,682.12
(b) Ill. Inheritance Taxes	35,616.26
(c) Fla. Inheritance Taxes	21,709.45
Total State Taxes	278,007.83
Difference is Wis. Estate Tax	352,701.79
(3) Wisconsin Emergency Tax:—	
Wis. Normal Taxes	
(1) above	220,682.12
Wis. Estate Tax	
(2) above	352,701.79
Total	573,383.91
Emergency Tax is 30%	172,015.20
Total Wisconsin Inheritance Taxes	\$745,399.11

Such computation is in accordance with the interpretation and application given to the Wisconsin Statutes by the Supreme Court of Wisconsin and its remand directs the County Court for Milwaukee County to so determine the Wisconsin inheritance taxes payable in the estate. It is from the judgment of the Supreme Court of Wisconsin to this effect that the appellant executor brings this appeal.

SUMMARY OF ARGUMENT

I. THE WISCONSIN INHERITANCE TAXES DO NOT OPERATE TO IMPOSE ANY TAX EXTRATERRITORIALLY.

A. Appellant does not carry his burden of showing extraterritorial impact of the taxes involved. He fails to show by clear and cogent evidence that such is the actual result here. Examples of what might be the situation in other extreme and hypothetical cases do not constitute evidence of extraterritorial taxation in this case.

B. Factually there is no extraterritorial taxation here. Of the entire property of decedent 87½% was within Wisconsin. The net estate subjected to taxation in Wisconsin amounts to only 48½% of the entire gross estate of decedent. Allowance of deduction for federal death taxes more than compensates for or offsets any effect resulting from computation of Wisconsin "estate" tax in relation to the 80% federal basic estate tax credit. Furthermore, the total of the Wisconsin "estate" tax of \$352,701.79 and the 30% "emergency" tax of \$105,810.54 computed on such "estate" tax, is \$458,512.33 which is only 72.6% of the federal 80% basic estate tax credit of \$630,709.62.

C. Fact that the total Wisconsin inheritance taxes exceed the federal 80% basic estate tax credit does not establish extraterritorial effect.

D. If the entire estate of the decedent were in Wisconsin the total Wisconsin inheritance taxes would be higher.

E. Measurement of the tax by factors outside the state does not itself render the tax extraterritorial. It is well established that rating of a tax by facts in respect to matters outside the state does not render it extraterritorial.

F. The pattern of the Wisconsin inheritance tax statutes, which includes the "normal" tax provisions, the "estate" tax statute, and the 30% "emergency" tax, is clearly to impose taxes only on the property within its taxing jurisdiction.

II. THE 30% ADDITIONAL EMERGENCY TAX IS NOT DIRECTLY GEARED TO THE FEDERAL ESTATE TAX.

It is laid at a percentage of the amount of the "normal" taxes and the amount of the Wisconsin "estate" tax, both of which are independent taxes that are clearly valid and laid as a burden solely on the transfer of property which is within the taxing jurisdiction of the State of Wisconsin.

ARGUMENT

I. THE WISCONSIN INHERITANCE TAXES DO NOT OPERATE TO IMPOSE ANY TAX EXTRATERRITORIALLY.

As computed the taxes involved do not fall upon any property except that portion of the decedent's property which was within the State of Wisconsin at his death and subject to its taxing jurisdiction. The appellant does not even contend that the taxes involved fall upon or are asserted against any property outside the State of Wisconsin. No claim is made that the property outside of the state is in any way liable for the Wisconsin inheritance taxes or that such taxes are a lien upon or collectible out of such property. All that appellant does is say that the

Wisconsin taxes operate to tax property outside of the state because such taxes bear a relationship to the federal estate taxes.

A. Appellant Does Not Carry His Burden of Showing Extraterritorial Impact of the Taxes Here.

Appellant shows that the total of the Wisconsin inheritance taxes in this case exceeds the amount of the federal estate tax credit of 80% of the federal basic estate tax and that in the absence of this 30% additional emergency tax the total of the Wisconsin inheritance taxes would not exceed such federal credit. Appellant says that because it is the imposition of the 30% additional emergency tax which makes the total Wisconsin taxes exceed the federal credit, therefore such 30% additional emergency operates here to tax property which is outside of the State of Wisconsin. But, that is not enough to carry the burden which the appellant assumes when he attacks the validity of this tax.

Examples are presented as to what appellant says would be the situation in other extreme estates when the facts are entirely different. These present no basis for saying that the taxes here operate to tax extraterritorially. Even though it might be that in some extreme set of circumstances, if such a case ever did arise (there having been none to date) the results would be as appellant sets out and go beyond the bounds of valid taxation, such examples assume that the Wisconsin tax laws would be applied there as appellant contends. They give no effect to the full realization by the State of Wisconsin that it cannot tax extraterritorially. Such examples, however, do not affect the case here. Those cases will be faced as and when

they arise, if they ever do, and it must be presumed that the Wisconsin tax statutes will be applied thereto in a constitutional manner.

Such extreme examples do not show unconstitutionality of these tax laws as applied in this case. Even if the results would follow in those instances and constitute extraterritorial taxation if applied in that fashion to such extreme cases, that would not make the taxes here invalid as in violation of equal protection. For then if such tax laws could not be so applied there because to do so would produce an invalid result, it would be because of the peculiar facts in such cases which are entirely different from the instant case. Appellant is the champion of no rights except his own.

The Hypothetical Table set out at page 16 of Appellant's Brief does not take proper account of the taxes paid to other states. The federal 80% basic estate tax credit is apportioned on the basis of the ratio of the Wisconsin property to the total estate and then the taxes paid to other states is deducted from the Wisconsin apportioned amount. This produces a figure that neither means or shows anything for it is a purely selected arbitrary result. If the appellant's theory is that Wisconsin should impose its estate tax on the basis of its apportionment of the federal 80% basic estate credit then there should be eliminated the deduction not only of the Florida and Illinois taxes but also the Wisconsin "normal" taxes which are deducted and do reflect an apportionment of the tax burden here.

The validity of the Wisconsin "estate" tax and the correct amount of it in the sum of \$352,701.79 are not questioned and are not in issue in this case. But in this Hypothetical Table the amount of the Wisconsin "estate" tax

is shown to be \$274,590.00, which figure is clearly erroneous and has nothing to do with this case.

The first table on page 13 of Appellant's Brief gives no consideration to the 30% "emergency" tax on the Wisconsin "normal" taxes nor to taxes paid other states. The second table on that same page gives no consideration to credit either for Wisconsin "normal" taxes or for taxes paid to other states.

In none of appellant's tables is it made clear that the 30% "emergency" tax is applicable separately to the Wisconsin "normal" taxes and the Wisconsin "estate" tax. There is no question but that this 30% "emergency" tax applies separately to each of said taxes. This is not in controversy in the case, but from the tables it would appear that the 30% "emergency" tax is always measured solely by the Wisconsin "estate" tax.

The brief of amicus curiae pursues the same method of showing extreme examples, yet the case which such counsel have as the basis for such brief here, is one where there is no property outside of the state of Wisconsin.

The situation here is comparable to where one attacks a state income tax apportionment formula used in the allocation of the income from the transaction of a multi-state business. In those cases the test is whether the state statute is fairly calculated to assign to that state that portion of the net income reasonably attributable to business done there. If so, the statute is valid and no constitutional question exists. The burden is on the one who attacks the statute as taxing extraterritorially. He must carry that burden by showing by "clear and cogent evidence" that the statute actually results in extraterritorial values being taxed. *Butler Bros. v. McColgan*, (1942) 315 U. S. 501, 62 S. Ct. 701.

86 L. ed. 991; *Edison California Stores, Inc. v. McColgan*, (1947) 30 Calif. (2d) 472, 176 Pac. (2) 697, 183 Pac. (2) 16.

There is no clear and cogent evidence in this case that the 30% additional emergency tax of section 72.74 results in extraterritorial taxation. Rather the facts show to the contrary.

Furthermore, consideration of the Wisconsin inheritance tax statutes, as is shown later herein in Subdivision I F., discloses that their design and application is such as to impose taxes only on the property which is within the taxing jurisdiction of the State of Wisconsin. Thus, like in the case of apportionment formulae, the design and purpose of the Wisconsin inheritance tax laws is to tax only property which it may properly and validly tax because it is within its taxing jurisdiction. Anyone who asserts that such inheritance tax laws have an operative effect of taxing property outside its taxing jurisdiction must likewise be held to proof thereof by clear and convincing evidence.

B. Factually There Is No Extraterritorial Taxation In This Case.

The 30% additional emergency tax is not laid extraterritorially by the provisions of section 72.74 nor is it applied in this case so as to tax any property other than that portion of the decedent's estate which is within the State of Wisconsin. The language of subsection (2) is that this 30% additional tax "is hereby imposed upon all transfers of property which are taxable under the provisions of" sections 72.01 to 72.74 and sections 72.50 to 72.61. This language makes it clear that this 30% additional tax is definite-

ly limited to the same property, the Wisconsin property, that is taxed by the "normal" Wisconsin inheritance tax and the Wisconsin "estate" tax.

The net Wisconsin estate of the decedent here subjected to the Wisconsin taxes is \$3,803,378.42, which is only 48½% of the entire gross estate of \$7,849,714.84. Such Wisconsin net estate is arrived at by taking the total of the property located in Wisconsin, which is \$6,869,778.61, and subtracting therefrom the allowable deductions of debts, expenses of last illness and burial, costs of administration and federal death taxes. As provided by section 72.04 (8) Wisconsin Statutes, these were all deducted on a pro rata basis of 87.48%. [The very slight difference between this and 87.52% arises out of adjustments in valuations not here material] Thus, the total of all federal death taxes (not just the federal basic estate tax) of \$3,076,131.19 was allowed and included in such deductions at \$2,690,999.56 as 87.48% of the total tax. This reduced the Wisconsin net estate by the full proportionate share of the total federal taxes referable thereto.

Such deduction allowances, and especially the allowance of a deduction for federal estate taxes, are purely matters of legislative grace. The State of Wisconsin is not required to make any such allowance but does so as a matter of reducing its taxation to an imposition on the net value actually transmitted to the beneficiaries. The effect of these deductions is to reduce the net estate subjected to taxation in Wisconsin to \$3,803,378.42 or only 48½% of the entire property of \$7,849,714.84 left by the decedent, of which total property only \$979,936.23 or 12½% was outside the State of Wisconsin.

If instead of deducting the \$3,066,400.19, which is 87½% of the allowable items, from the Wisconsin gross estate of

\$6,869,778.61, the allowable items were subtracted at 100%, or \$3,505,258.50, from the total gross estate everywhere of \$7,849,714.84, the result would be \$4,344,456.34 as the total net estate everywhere. Applying to this last figure the 87½ percentage for the Wisconsin property produces \$3,803,378.42 which is the amount of the net estate in Wisconsin that is subjected to its taxes. This shows that, in the design of the Wisconsin inheritance taxes and their application to this estate, the objective is to confine their imposition to property within the state and they have been so applied here.

This result is found as a fact by the Supreme Court of Wisconsin where it notes that more than 86% of the property was admittedly located in Wisconsin. The accurate percentage is 87.52%. The federal estate tax credit which enters into the Wisconsin estate tax imposed by secs. 72.50 to 72.61 is however only 80% of the federal basic estate tax. The other 20% more than absorbs, or is, on any mathematical basis, attributable to the 12.47% of the gross estate which is outside of Wisconsin.

It is also significant as respects the Wisconsin "estate" tax that in its calculation there is deducted out the total death taxes paid the States of Illinois and Florida. This shows that such tax is levied only in respect of property situated in the State of Wisconsin.

Moreover, in the calculation of said Wisconsin "estate" tax the Wisconsin "normal" inheritance taxes are also deducted. The result is that the Wisconsin "estate" tax is equal to only 55.92% of the federal 80% basic estate tax credit and that percentage of the federal 80% basic estate tax credit is the amount by which the 30% "emergency" tax in controversy is measured.

The deductions made in arriving at the net Wisconsin taxable estate, and especially the inclusion therein of an allowance for the entire federal death taxes, furnishes and operates as a compensating factor which more than offsets or overcomes, so far as the property upon which the tax actually falls is concerned, any influence that could possibly be deemed to result from the use of the federal estate tax 80% credit in computing the Wisconsin "estate" tax and the rating of the "additional emergency tax" at 30% thereof.

In the calculation of the net Wisconsin taxable estate there is a deduction taken of \$2,690,999.56 for federal death taxes, which deduction is a matter of pure legislative grace and operates to reduce the property valuation subjected to Wisconsin taxes by exactly that amount. On the other hand the entire 80% federal estate tax credit is only \$630,709.62. Were no deduction allowed for the federal death taxes paid the result would be that the Wisconsin "normal" inheritance taxes payable by the beneficiaries would be very much higher, as a result of the progressive rates in the higher brackets. If such deduction of \$2,690,999.56 were not allowed the Wisconsin net taxable estate would be that much larger. Such increase in the net estate would fall into the top bracket of 10% which would raise the Wisconsin "normal" taxes approximately \$270,000. That amount far exceeds the "emergency" tax of \$172,015.20. Furthermore, there can be no question that then the application of the 30% "emergency" tax to such augmented "normal" taxes of some \$490,000 or approximately \$147,000 would be valid.

Comparison of the mathematical relationship of the amount of the Wisconsin "estate" taxes and the amount of the "emergency" taxes with the amount of the federal 80%

basic estate tax credit shows quite a different picture from that attempted by appellant. The amount of the Wisconsin "estate" tax is \$352,701.79. The 30% "emergency" tax computed thereon amounts to \$105,810.54. The total of these two amounts is \$458,810.54 which is only 72.7% of the federal 80% basic tax credit of \$630,709.62, whereas the property in Wisconsin is 87½% of the entire property of the decedent. Even if instead of just the 30% emergency tax computed on the Wisconsin "estate" tax, the entire 30% emergency tax of \$172,015.20 is used, then the total of the Wisconsin "estate" tax and the "emergency" tax is \$524,716.99, which again is only 83.2% of the federal 80% basic tax credit as compared with the 87½% ratio of Wisconsin property to property everywhere.

A similar comparison with the total of the federal basic estate tax is equally significant. The entire federal basic tax is \$788,387.02. The \$458,810.54 total of the Wisconsin "estate" tax and the 30% "emergency" tax computed only on such Wisconsin "estate" tax, is 66.3% of the entire federal basic estate tax. The \$524,716.99 total of the Wisconsin "estate" tax and the entire 30% "emergency" tax, is 76.1% of the entire federal basic estate tax.

These comparisons show that the total of the Wisconsin "estate" and "emergency" taxes is at a far lesser percentage of the federal 80% basic estate tax credit, and of the federal basic estate tax itself, than the percentage thereof that are attributable to Wisconsin property.

C. That the Wisconsin Inheritance Taxes Exceed the Federal Estate Tax Credit Does Not Establish That They Are Extraterritorial in Effect.

The mere fact that the total of the Wisconsin inheritance taxes exceeds the federal estate tax credit cannot render such Wisconsin inheritance taxes invalid as extraterritorial in effect. If that were true then there would be invalidity in the Wisconsin inheritance taxes in almost all Wisconsin estates. The amount of the "normal" Wisconsin inheritance taxes under sections 72.01 to 72.24 exceeds any federal credit allowable in all but the very large estates of over about \$2,000,000 and in the rare case where special circumstances may result in the Wisconsin "normal" tax being less than the federal credit. Clearly the mere mathematical fact of the Wisconsin "normal" taxes being in excess of the federal estate tax credit does not render such "normal" taxes invalid as taxing extraterritorial values. This demonstrates that the mathematical result that the total Wisconsin inheritance taxes exceed the federal tax credit does not establish or show extraterritorial taxation.

Furthermore, it is clear that the Wisconsin "estate" tax of sections 72.50 to 72.61 would be payable and in the same amount, which is also true of the "normal" inheritance taxes of sections 72.01 to 72.24, regardless of the existence of this 30% emergency tax. The validity of such other taxes is not questioned as operating to tax extraterritorially. It thus logically follows that the admeasuring of the additional emergency tax at a percentage of the amount of such other admittedly valid taxes does not and cannot of itself operate as extraterritorial taxation.

In addition, in instances where the amount of the "normal" Wisconsin inheritance taxes under sections 72.01 to

72.24 exceeds the federal tax credit, which is in practically all Wisconsin estates, not only is it true that the fact the normal taxes do exceed the federal credit does not make the "normal" tax invalid or extraterritorial taxation to the extent of such excess, but the 30% additional emergency tax is applied to such total Wisconsin "normal" inheritance taxes. In such cases the amount of the emergency tax likewise is in excess of the federal tax credit. But, clearly that is of no moment and it does not cast any doubt upon the validity of the emergency tax in those cases. The 30% emergency tax in those cases not only itself is beyond the federal tax credit but it is computed at a percentage of a previously computed tax which exceeds the federal tax credit. In this same connection it may be noted that in many Wisconsin estates the total of the Wisconsin "normal" inheritance taxes under sections 72.01 to 72.24 not only exceeds the federal tax credit but exceeds the total of all federal death taxes. Yet, the 30% emergency tax is equally applicable and valid in such cases.

The foregoing shows that the mere fact that the total of the Wisconsin inheritance taxes is in excess of the amount of the federal estate tax credit will not support appellant's assertion of extraterritorial taxation. Therefore if there is to be any support for this charge it must be found in a consideration of the facts from a mathematical point of view. But the facts rather than sustaining it clearly show to the contrary.

D. Were the Entire Estate of the Decedent in Wisconsin the Total Wisconsin Inheritance Taxes Would be Larger.

It is maintained that factually the taxes here do not fall and are not imposed upon property outside of Wisconsin; that the fact that the taxes exceed the 80% federal estate tax credit does not make them extraterritorial in operation; and that the admeasuring of a state tax by factors outside the state likewise does not render the tax extraterritorial where as here the tax is laid on a net valuation which is far less than the total valuation of the property of the decedent in the state. But, in addition, the conclusive demonstration of the restriction of this tax to solely that part of the decedent's property which was within the taxing jurisdiction of Wisconsin by being located in that state, is a calculation of the Wisconsin taxes that would have been payable had the entire estate of the decedent been in Wisconsin. If the entire \$7,849,714.84 had been Wisconsin property then the Wisconsin Inheritance Taxes would have been very much higher than in the instant case. Following is the calculation if such were the case:

Total Wisconsin Estate	\$7,849,714.84	
Less—deductions (100%)	3,505,258.58	
	<hr/>	
Net Wisconsin taxable estate	\$4,344,456.26	
	<hr/>	
Normal Taxes (approximate)		\$285,609.00
Wisconsin Estate Tax—		
Federal 80% credit	680,709.00	
Less—Wis. Normal Tax	285,609.00	
	<hr/>	
		345,100.00
Emergency taxes—		
Normal Taxes	\$285,609.00	
30% thereof	85,682.70	
Wis. Estate Tax	345,100.00	
30% thereof	103,530.00	
	<hr/>	
		189,212.70
		<hr/>
Total Wisconsin Taxes		\$819,921.70

This shows that the total Wisconsin Inheritance Taxes payable in this estate are not higher as asserted by the appellant because part of the property was outside the state, but on the contrary that such taxes are lower because of the fact that a part of the property was outside the state.

E. Measurement of the Tax by Factors Outside the State Does Not of Itself Render a Tax Extraterritorial.

Even though it were to be considered that, because the 30% "additional emergency tax" is computed in part upon the amount of the Wisconsin "estate" tax which in turn is calculated in relation to the 80% federal estate credit, there is a using of the property outside of Wisconsin in measuring the amount of such 30% additional tax, still that standing alone does not make this 30% tax have an extraterritorial effect and invalid. It is well established that a state tax may be measured by property, events or action which have a location outside of the state and that such rating of the tax by such outside factors does not make the tax invalid as extraterritorial. *Marwell v. Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 63 L. ed. 1124; *Great Atlantic & Pacific Tea Co. v. Grosjean*, (1937) 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 1193; *State of Wisconsin v. J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267.

In *Marwell v. Bugbee*, *supra*, the Court said at page 539:

"* * * When the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of the tax imposed. This principle has been frequently declared by decisions of this court. The previous cases were reviewed and the doctrine applied in *Kansas City, Fort Scott & Memphis Ry. Co. v. Kansas*, 240 U. S. 227, 232. * * *

The instant case is in no way comparable to *Frick v. Pennsylvania*, (1925) 268 U. S. 473, 45 S. Ct. 603, 69 L. ed. 1058, relied upon by the appellant. The Pennsylvania statute there involved expressly laid the taxes on the transfer

of property by a resident decedent whether it was within that state or elsewhere. No deduction was made for any taxes paid to the United States or to any other state. In computing the tax the value of tangible property located in New York and Massachusetts was admittedly included in the gross estate upon which the Pennsylvania tax was calculated upon the premise that such property had a tax situs in Pennsylvania. In that case there thus was a clear and express endeavor by the State of Pennsylvania to directly tax property which concededly was physically located in other states. The tax was applied to and calculated upon that property directly. Here the Wisconsin statutes do not attempt to impose taxes upon anything other than the property which is located in the State of Wisconsin. The statutes on the contrary restrict the taxes to property within the state. The values of property outside the State of Wisconsin are excluded from the value upon which the taxes are calculated. Furthermore, deduction is made for federal estate taxes in arriving at the value of the estate upon which such taxes are calculated, and in computing the Wisconsin estate tax full deduction is made for the taxes paid to other states. The dissimilarity between the two cases is readily apparent.

F. The Pattern of the Wisconsin Inheritance Tax Statutes Clearly is the Imposition of Taxes Only on the Property Within its Taxing Jurisdiction.

The Wisconsin statutes which impose the "normal" inheritance taxes are sections 72.01 to 72.24, the material parts of which are printed herein under the heading Statutes Involved. They were enacted in 1903. Very clearly their import is to confine the "normal" inheritance taxes to property within the State of Wisconsin or its taxing jurisdiction. While there are no express provisions therein that can be pointed to as so stating, the application and administration of such "normal" inheritance tax provisions has always over the years been consistently limited to property of a resident which is within the state or its taxing jurisdiction. It is clearly implied from the over-all language and effect of these provisions that they are so limited. No one has ever contended otherwise. Furthermore, it is fundamental that such would necessarily have to be the scope of such provisions. Otherwise they would be invalid to the extent they purported or endeavored to tax property not within the state or its taxing jurisdiction. If there were any doubt about it the provisions would have to be given that construction which would be constitutional.

Such "normal" inheritance tax provisions had existed for many years and been given application as above stated, when the Wisconsin "estate" tax law, sections 72.50 to 72.61, was enacted by Chapter 426, Laws of Wisconsin of 1931. The language of said sections when read as a whole clearly implies that the estate which is subjected to said "estate" tax is diminished by the property which is outside the state. Credit is given for and in the amount of any taxes paid

other states. The provisions of section 72.61 expressly say that the same law applies to this "estate" tax that is applied to the "normal" inheritance tax by the provisions in sections 72.01 to 72.24. That language of section 72.61 is:

"The provisions of Chapter 72, relating to the tax on inheritances and transfers, shall apply * * *."

The reference to "Chapter 72" is occasioned by the fact that when sections 72.50 to 72.61 were enacted in 1931 the provisions in Chapter 72 of the Wisconsin statutes consisted solely of the "normal" inheritance tax statutes, sections 72.01 to 72.24. At the present time Chapter 72 of the Wisconsin statutes is composed solely of sections 72.01 to 72.24 relating to the "normal" inheritance tax, sections 72.50 to 72.61 providing the "estate" tax, and section 72.74 imposing the 30% additional "emergency" tax.

This statement in section 72.61 clearly expresses the legislative intent that the "estate" tax imposed by sections 72.50 to 72.61 is to be applied the same as the "normal" inheritance tax provisions and thus is to apply only to the same transfers of property that are taxed by the "normal" tax.

The 30% "emergency" inheritance tax statute, section 72.74 was originally adopted in 1933 by Chapter 363, Sec. 3, Laws of Wisconsin of 1933, but solely for relief purposes. The "normal" inheritance tax and the Wisconsin "estate" tax were then both in operation. The state was sorely pressed for funds because of the depressed economic conditions and the legislature sought ways to obtain additional revenue and especially to carry the relief load. By said Ch. 363, Laws of 1933 it imposed (1) an emergency income tax on income of 1932, which was in addition to the then

existing income tax, (2) an emergency gift tax and (3) this "emergency" additional tax on inheritances, all for the express purpose of raising additional revenue for relief. It merely viewed the existing taxes and finding them insufficient imposed these new taxes as an additional burden. The legislature found that the taxes on existing sources of revenues were insufficient to produce the needed revenue and merely in effect increased the taxes. So far as the matter of inheritance taxes is concerned, the legislature clearly did nothing more in 1933 than say that the property within the state's taxing jurisdiction should stand a part of the burden of the additional revenue needs of the state. The language in section 72.74 that the additional "emergency" tax " * * * is hereby imposed on all transfers of property which are taxable under the provisions" of sections 72.01 to 72.24 and 72.50 to 72.61, is conclusive that such "emergency" tax is thus solely upon the same property that is subject to the "normal" and "estate" taxes.

By successive amendments biennially the Wisconsin legislature extended the life of the provisions in section 72.74. By Chapter 367, Sec. 3, Laws of 1943, in extending its effect to July 1, 1945, the purpose and use of the revenue thus raised was changed to its present language of providing revenue "for the rehabilitation of returning veterans of World War II, construction and improvements at state institutions and other state property, and postwar public works projects to relieve postwar unemployment."

From the above analysis of the Wisconsin inheritance tax statutes it is demonstrated that clearly the over-all intent and application thereof is the imposition of taxes solely upon the property which is within the state's taxing jurisdiction.

II. THE 30% ADDITIONAL EMERGENCY TAX IMPOSED BY SECTION 72.74 WISCONSIN STATUTES 1943 IS NOT DIRECTLY GEARED TO THE FEDERAL ESTATE TAX.

This is self-evident. On the contrary it is computed at 30% of the amount of two other independent taxes. By its express terms this "emergency" tax is an amount "equal to 30 per cent" of the amount of the "normal" Wisconsin inheritance tax imposed by sections 72.01 to 72.24 and the Wisconsin "estate" tax imposed by sections 72.50 to 72.61.

Both the "normal" inheritance tax and the Wisconsin "estate" tax are computed and imposed independently of this "emergency" tax. No question is raised as to the validity of those taxes and they must therefore stand as admittedly valid. They are computable and payable regardless of the existence of this "emergency" tax. Such taxes are payable in the same amount even though this 30% "emergency" tax did not exist. These two other taxes were in effect and operation before the 30% additional "emergency" tax was adopted, and the 30% additional tax is an "emergency" tax whose repeal would in no way affect the amount of said other taxes.

It is not until and after the amounts of said other taxes are computed and fixed that this "emergency" tax is laid and it is computed at the amount which is "equal to" 30% of the amount of such other taxes. In other words, such other independent taxes are taken at their calculated amounts and the "emergency" tax is figured thereon without any reference to how such amounts were calculated. They are taken as a fixed amount of taxes in dollars and cents and then the 30% figure is applied to such dollars and cents amounts to obtain the amount of the "emer-

gency" tax. That this result may bear some relationship, mathematical or otherwise, to the amount of the federal estate tax credit or even to the amount of the federal state tax is purely coincidental.

The statement of appellant that the 30% additional "emergency" inheritance tax imposed by section 72.74 is always 30% of the federal estate tax credit and 24% of the federal basic estate tax is both incorrect and misleading. The tables submitted in connection with such statement do not state the true picture. Such tables are correct and the calculations therein are applicable *only* where the entire property of the decedent is in the State of Wisconsin and the "normal" Wisconsin inheritance taxes under sections 72.01 to 72.24 are less than the 80% federal estate tax credit. Where that is true then obviously no question of extraterritorial taxation can possibly arise. Accordingly the examples in said tables prove nothing that is relevant to this case.

Furthermore, the appellant makes another erroneous statement where, in summarizing the Wisconsin inheritance tax laws, it is stated that the Wisconsin "estate" tax of sections 72.50 to 72.61 is "levied upon the whole estate of the decedent." There is no such language in those sections and such tax, being grounded upon jurisdiction to tax because of domicile of the decedent, is limited to and levied only upon the Wisconsin estate of the decedent.

This Wisconsin "estate" tax accrues in less than 1% of Wisconsin estates. It is the exceptional case in which it is applicable at all. This arises because it applies only in estates in excess of approximately \$2,000,000 or where there are very peculiar circumstances, since the "normal" Wisconsin inheritance tax computed under sections 72.01

to 72.24 exceeds the amount of the federal estate tax credit of 80% of the federal basic tax.

It is thus abundantly clear that the 30% additional "emergency" tax of section 72.74 is not geared to the federal estate tax but to the amount of the "normal" Wisconsin inheritance tax of sections 72.01 to 72.24 and the amount of the Wisconsin "estate" tax of sections 72.50 to 72.61, both of which taxes are imposed solely upon the Wisconsin estate of the decedent and are not laid upon any property other than that which is within the jurisdiction of the State of Wisconsin.

It is therefore submitted that the decision of the Supreme Court of Wisconsin should be affirmed.

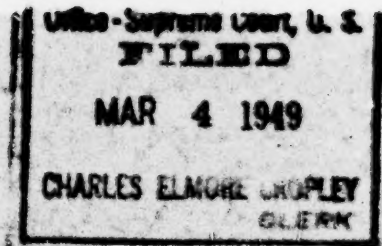
Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. ~~547~~ 20

**OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF
FRED A. MILLER,**

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

**STATEMENT RE JURISDICTION BY J. GILBERT
HARDGROVE, AMICUS CURIAE**

J. GILBERT HARDGROVE,
Amicus Curiae

MILLER, MACK & FAIRCHILD,
Of Counsel.

INDEX

SUBJECT INDEX

Statement re jurisdiction by J. Gilbert Harsgrove,
amicus curiae

1

TABLE OF CASES CITED

Frick v. Pennsylvania, 268 U. S. 473

3

Opinion of the Justices, 154 Atl. 633

4

STATUTES CITED

Constitution of the United States, 14th Amendment

10

Internal Revenue Code, Section 813 (b)

2

Wisconsin Statutes:

Sections 72.01-72.24

2, 8

Section 72.50-72.61

2

Section 72.74

1, 3, 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 547

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF
FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT RE JURISDICTION BY AMICUS CURIAE

The particular facts in the *Estate of Fred A. Miller* on the basis of which this appeal has been taken, and the text of the statutes involved, are fully set out in appellant's jurisdictional statement and in appellee's statement opposing jurisdiction. The purpose of this Statement re Jurisdiction by *Amicus Curiae* is not to reiterate these facts, but to analyze generally the underlying problem which is here presented to this Court.

The undersigned is of the opinion that the holding of the Supreme Court of Wisconsin in this case presents a substantial federal question in that Section 72.74 as construed

and applied by said Court is repugnant to the Fourteenth Amendment of the Constitution of the United States.

The question here presented concerns the joint application to certain special Wisconsin estates of three separate Wisconsin death duties. In the interests of consistency these shall be referred to hereafter as (1) the Normal Tax, (2) the Wisconsin Estate Tax, and (3) the Emergency Tax.

The *Normal Tax* is levied by Sections 72.01 through 72.24 of the Wisconsin Statutes. It is a graduated inheritance tax measured by the amount of property passing to each legatee and it has varying rates and exemptions which are dependent upon the relationship of the legatee to the decedent. In the great majority of Wisconsin estates the aggregate Normal Taxes exceed the 80% credit for state taxes paid granted by Section 813 (b) of the Internal Revenue Code against the Federal Basic Tax. These estates present no problem. In certain exceptional Wisconsin estates, however, the aggregate Normal Taxes are less than this 80% credit, and it is in these estates only that the problem here presented arises.

The *Wisconsin Estate Tax* is levied by Sections 72.50 through 72.61 of the Wisconsin Statutes. It was enacted in 1931 in order to obtain for the state the benefit allowed by the federal 80% credit. It is equal to the amount, if any, by which the federal 80% credit exceeds the aggregate of the Wisconsin Normal Taxes and of the taxes paid to other states. Its original effect, at the time of its enactment, was to prevent the aggregate state death duties on any Wisconsin estate from totalling less than a *minimum* equal to the federal 80% credit. At the same time the Wisconsin Estate Tax Law provided (and still provides) expressly that this tax shall not cause the aggregate state death duties on any estate to *exceed* the 80% credit. In other words, as this law was originally applied, only the Normal Tax, which is measured by property subject to the taxing jurisdiction

of Wisconsin, could cause the aggregate state death duties to exceed the 80% credit which the estate is obligated to pay to someone in any event.

The *Emergency Tax* is levied by Section 72.74 of the Wisconsin Statutes and was enacted in 1935. It is set up in the form of a separate tax, equal in amount to 30% of all other Wisconsin taxes paid by any estate. In the majority of Wisconsin estates its net effect is merely to increase the Normal Tax rates by 30%, since the Normal Tax is the only one levied. In those special estates where the normal tax is less than the federal 80% credit, however, its effect has been less clear. Since it is as much a transfer tax as any other, and since the Wisconsin Estate Tax provides in terms that it shall equal the amount by which the federal 80% credit exceeds all transfer taxes paid to this or other states, it was originally contended by the executor in this case that the Emergency Tax should also be deducted in computing the Wisconsin Estate Tax. The ruling of the Wisconsin Supreme Court was to the contrary. Hence, the effect of the Emergency Tax, as so construed, is now to raise the minimum Wisconsin tax payable by these special estates to an amount equal to the federal 80% credit, less succession taxes paid to other states, plus 30% of this difference. Further simplified, this means that the aggregate Wisconsin taxes in each such estate now equal exactly 1.3 times the amount of the 80% credit, less death duties paid to other states.

Even before the enactment of the Emergency Tax, the nature of the Wisconsin Estate Tax was such as to cause some constitutional questions under the rule of *Frick v. Pennsylvania*, 268 U. S. 473 (1925). In that case this Court held that a state may not constitutionally measure a tax directly or indirectly by real or tangible personal property situated outside the taxing jurisdiction of the state. The Wisconsin Estate Tax, as originally applied, caused

Wisconsin estates to pay a *minimum tax* equal exactly to the difference between the taxes paid to other states and the federal 80% credit. It is obvious that this tax was not, like the Normal Tax, measured by the property subject to the taxing jurisdiction of Wisconsin. Instead it was a tax measured by the federal 80% credit. This credit was, and is, measured in turn by the federal basic tax, which in its turn is measured by the entire federal gross estate of the decedent containing all his property wherever situated.

This constitutional question was recognized by the Justices of the Supreme Court of New Hampshire in dealing with a substantially identical New Hampshire tax. In *Opinion of the Justices*, 154 Atl. 633 (N. H. 1931) they stated as follows:

"The nation lays a valid tax and makes valid provision for its partial distribution to the several states, through the process of local assessments and the deduction thereof from the federal tax. Substance, not form, governs in these matters; and this is the substance of the whole transaction."

It would seem that the rationale of this decision is sound. The minimum tax levied against these exceptional estates by a statute such as the Wisconsin Estate Tax Law is measured by all of the decedent's property wherever situated. For that reason, where a decedent owns real or tangible personal property outside the jurisdiction of the taxing state, such a tax would be unconstitutional if the tax caused his estate any harm. But in reality the Wisconsin Estate Tax as originally applied was *damnum absque injuria*. It caused the estate to pay to the state only what (in the absence of the tax) it would otherwise be obligated to pay to the federal government. It deprived the estate of no property which would not legally be taken from it in any event, and its true effect was merely to divert funds from one destination to another. As soon as the estate was required to pay

state taxes in excess of the 80% credit, the Wisconsin Estate Tax dropped out and the amount of the Wisconsin tax was thenceforward measured only by property subject to the jurisdiction of the state.

The Wisconsin Emergency Tax, as construed by the Wisconsin Supreme Court in this case, entirely alters this picture. The minimum tax which is required to be paid in the aforementioned special estate now amounts to *more* than the federal 80% credit. At the same time the amount of this minimum tax is still measured by all of the decedent's property wherever situated.

As an example, let us assume a simple Wisconsin Estate where the federal basic tax equals \$125,000, where the Wisconsin Normal Taxes amount only to \$50,000, and where succession taxes amounting to \$10,000 have been paid to other states. The total Wisconsin taxes would then be computed as follows according to the rule adopted by the Supreme Court of Wisconsin in this case:

(1) Normal Tax		\$50,000
(2) Wisconsin Estate Tax		
Federal 80% Credit	\$100,000	
Less: (a) Normal Tax	\$50,000	
(b) Other State		
Taxes	10,000	
Total State Taxes	60,000	
Difference		\$40,000
(3) Emergency Tax		
Normal Tax	\$50,000	
Wisconsin Estate Tax	40,000	
Total	\$ 90,000	
Emergency Tax (30% of Total)		27,000
Total Wisconsin Taxes		\$117,000

This estate is, therefore, being subjected to a minimum Wisconsin ~~tax~~ totalling \$17,000 more than the federal 80% credit. This \$17,000, in the absence of the Wisconsin Emergency Tax levied by Section 72.74, would not have to be paid at all. Yet this minimum tax of \$117,000 is measured, *not* by the decedent's property in Wisconsin, but by the federal basic tax which in turn is measured by all the decedent's property wherever situated. This may be seen clearly from the fact that it is not necessary to have any knowledge of what property of the decedent was, or was not, subject to the taxing jurisdiction of Wisconsin in order to compute this minimum Wisconsin tax.

As stated before, the real effect of these Wisconsin Statutes is to prescribe, for these special Wisconsin estates, a minimum tax equal exactly to 1.3 times the amount of the federal 80% credit less death duties, if any, paid to other states. Thus actually the Wisconsin taxes on the estate assumed above (as well as on any such estates) may equally well be computed in the following manner:

Federal Basic Tax	\$125,000
80% Credit	<u>100,000</u>
Less Taxes Paid to Other States	10,000
Difference	\$ 90,000
1.3 times Difference	117,000

Fred A. Miller owned nearly a million dollars' worth of real and tangible personal property in Florida and Illinois. The federal basic estate tax on his entire estate, including this property, was \$788,387 computed to the nearest dollar. The total death duties paid other states amounted to \$57,326. The aggregate of his Wisconsin death duties as computed by the Wisconsin Supreme Court was \$745,399. Yet, without any consideration whatsoever of what property was

subject to the taxing jurisdiction of Wisconsin, these Wisconsin taxes may be computed in the same manner as above:

Federal Basic Tax	\$788,387
80% thereof	630,710
Less Taxes Paid to Other States	57,326
Difference	\$873,384
1.3 Times Difference	745,399

This is all that is required. The additional figures contained in the method of computation used by the Wisconsin Supreme Court add nothing to the result.

It is respectfully submitted that a Wisconsin tax, which exceeds the extent to which it effects a federal tax saving, and which may be computed in the above manner without any regard to the amount of property subject to the jurisdiction of the State of Wisconsin, is repugnant to the Fourteenth Amendment of the Constitution of the United States under the rule of *Frick v. Pennsylvania*, *supra*.

The effect of these Wisconsin Statutes in taxing property beyond the jurisdiction of Wisconsin is strikingly illustrated in the following example. Let us assume that the estate of a decedent resident of Wisconsin, after the payment of all debts and costs of administration, contained the following property

Real Estate and Securities in Wisconsin	\$35,000
Real Estate in Nevada	\$2,000,000

Only the \$35,000 of Wisconsin property would be subject to the taxing jurisdiction of Wisconsin, but the decedent's federal estate would include his property in both states. Nevada has no inheritance or estate tax. The federal estate tax on this estate, computed to the nearest dollar would be \$639,830. The federal basic tax would be \$127,650, and the 80% credit would amount to \$102,120. The proportional part of the federal taxes deductible from the decedent's

Wisconsin estate under Section 72.04 (8) of the Wisconsin Statutes would be \$11,004, leaving a net Wisconsin Estate of \$23,996. Assuming that the decedent left this \$23,996 to his widow, the computation of the Wisconsin taxes on this estate, in the manner prescribed by the Wisconsin Supreme Court, would be as follows:

(1) Normal Tax			\$ 180
(2) Wisconsin Estate Tax			
Federal 80% Credit		\$102,120	
Less: Normal Tax	\$ 180		
Other State			
Taxes	0		
Total State Taxes		180	
Difference			101,940
(3) Emergency Tax			
Normal Tax	\$180		
Wisconsin Estate Tax	\$101,940		
Total		\$102,120	
30% Additional Tax			\$ 30,636
Total Wisconsin Taxes			\$132,756

Of this \$132,756, the 80% credit or \$102,120 would be payable to the federal government in any event, if it were not payable to the state. But the difference between these two figures, or \$30,636, is assessed against this estate *only* by virtue of the Wisconsin Emergency Tax, and it amounts to over \$6,000 more than the property that is being taxed in Wisconsin. At the same time it equals exactly 30% of 80% of the federal basic tax on the gross estate of \$2,035,000.

In *Frick v. Pennsylvania*, at page 495 of this Court's opinion, it is stated that the way must not be opened for "doing indirectly what is forbidden to be done directly". . . . If the decision of the Wisconsin Supreme Court

in this case is permitted to stand it would open such a way, for it would give to a state the power to measure its taxes, not by the property subject to its jurisdiction, but by the amount of a federal tax which is measured by property beyond its jurisdiction. By such an indirection a state could obtain for itself the same results which would follow from direct taxation of such property.

It is asserted in the opinion of the Wisconsin Supreme Court that the constitutional problem outlined above does not arise on the facts of this case, since over 80% of the decedent's property was in Wisconsin and the tax is based on an 80% federal credit. This is a *non sequitur*. A tax measured by 80% of the federal basic tax is no less measured by the decedent's federal gross estate than is a tax measured by the entire basic tax. Moreover the distinction is merely one of phraseology. The Wisconsin tax on these estates can just as easily be expressed in terms of the entire basic tax as in terms of 80% thereof. The \$745,399.11 of Wisconsin tax involved in this case is exactly equal to 130% of the difference between 80% of the decedent's federal basic tax and the death duties paid by his estate to other states. It is also equal exactly to 104% of his *entire* basic tax, less 130% of the death duties to other states. The latter formula will just as accurately compute the Wisconsin taxes in this, and all other such Wisconsin estates, as will the former. The fact remains that the amount of this tax is wholly measured by two factors only: (1) The amount of the federal gross estate and (2) the death duties paid to other states. Neither of these factors bears any relation to the value of the decedent's property within the taxing jurisdiction of Wisconsin, and yet that property is the only measure by which this state may constitutionally compute its tax.

It is, therefore, the opinion of the undersigned that this case presents a substantial federal question under the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

J. GILBERT HAEIGROVE,
Attorney and Amicus Curiae.

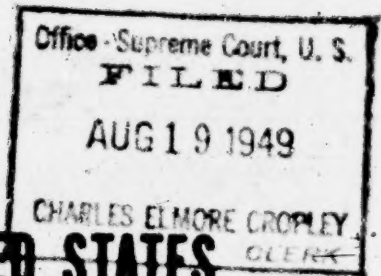
MILLER, MACK & FAIR-
CHILD,

Of Counsel.

February 15, 1949.

P. O. Address: 735 North Water Street,
Milwaukee 2, Wisconsin.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. **20**

20

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF
FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF BY AMICUS CURIAE

J. GILBERT HARDGROVE,
Amicus Curiae

MILLER, MACK & FAIRCHILD,
Of Counsel

INDEX

SUBJECT INDEX

	Page
Introduction	1
Official Report of Opinion in Lower Court	2
Grounds on which Jurisdiction is Invoked	2
Statement of Case	2
Assigned Errors	2
Statutes	2
Outline of Argument	3
Argument	5
Conclusion	24

TABLE OF CASES CITED

<i>Frick v. Pennsylvania</i> , 268 U.S. 473 (1925)	9
<i>Opinion of the Justices</i> , 85 N. H. 572, 154 Atl. 633 (1931)	6

STATUTES CITED

Constitution of the United States, 14th Amendment ..	1, 24
Internal Revenue Code, Section 813(b)	3, 6, 7
Wisconsin Statutes:	
Sections 72.01-72.24	5, 7, 11
Section 72.04(8)	20
Sections 72.50-72.61	6, 8, 11
Section 72.50	7, 8
Section 72.56	8

Section 72.74 1, 2, 3, 5, 11

Section 72.74(2)

Wisconsin Session Laws:

Laws of 1903, Chapter 44

Laws of 1931, Chapter 426

Laws of 1935, Chapter 15, Section 3

7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 547

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF
FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF BY AMICUS CURIAE

This brief is filed with leave of court as *Amicus Curiae*

Fred A. Miller, a Wisconsin resident, died on December 19, 1943, leaving, in addition to his principal estate in Wisconsin, real and tangible personal property in Florida and in Illinois. Under a Wisconsin statute (Sec. 72.74, Wis. Stats., 1943) imposing an emergency tax (in addition to inheritance and Wisconsin estate taxes), the State has in part based and measured that tax on and by the value of property in Florida and Illinois. This, it is submitted, constitutes taking property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

OFFICIAL REPORT OF OPINION IN LOWER COURT

Decision rendered December 15, 1948.

Estate of Miller, 254 Wis. 24 (Adv. Sheets), 35 N.W.
(2d), 404.

GROUND ON WHICH JURISDICTION IS INVOKED

As construed and applied in this case, Section 72.74, Wis. Stats., under which the emergency tax was assessed, takes property without due process of law in that the tax thereunder is in part based upon and measured by the value of property without the State of Wisconsin and beyond its taxing power.

STATEMENT OF CASE

The facts in the *Estate of Fred A. Miller* which this Court must consider on this appeal are set out in detail in the appellant's brief, and will not be restated herein.

ASSIGNED ERRORS

The *amicus curiae* has no standing to assign error. However the basis for this argument is sufficiently laid in the appellant's assignment of error.

STATUTES

The references to the Wisconsin Statutes herein are to the statutes of 1943. These are set out in the appellant's brief. Some will be quoted in the body of this brief.

OUTLINE OF ARGUMENT

I. Section 72.74 of the Wisconsin Statutes, which levies the EMERGENCY TAX, and which is herein claimed to result in a deprivation of property without due process of law, is one of three interrelated Wisconsin tax statutes. The taxes levied by the other two statutes are herein referred to as the NORMAL TAX and the WISCONSIN ESTATE TAX. An understanding of the problem requires an understanding of all three.

II. The NORMAL TAX is an unexceptional state inheritance tax. It is levied only on property within the state, and it is of importance here only in so far as it is incorporated by reference into the Wisconsin Estate and Emergency Tax Laws.

III. The WISCONSIN ESTATE TAX was enacted to take advantage of the credit for state taxes granted by Section 813 (b) of the Internal Revenue Code. It is equal to the excess (if any) of the amount of the federal 80% credit over the aggregate amount of Wisconsin and other state death duties. It applies to only a limited number of Wisconsin estates, and its original effect was to require such estates to pay minimum state death duties exactly equal in amount to the federal 80% credit.

IV. The WISCONSIN ESTATE TAX is theoretically an *ultra vires* tax since it is measured by a decedent's federal estate which may include property beyond the taxing jurisdiction of Wisconsin. It is saved from unconstitutionality only by the fact that it diverts to the state tax moneys which would otherwise have to be paid to the federal government, and hence it does not result in a deprivation of property.

V. The EMERGENCY TAX is a tax equal in amount to 30% of the sum of the Wisconsin Normal and Estate Taxes. When applied to Wisconsin estates which are subject to the Wisconsin Estate Tax, it has the same inherent vice as the Wisconsin Estate Tax, being measured, not by the decedent's Wisconsin estate, but by his federal estate containing all his property wherever situated. At the same time, being levied in excess of the compensating factor of the 80% credit, it causes a deprivation of property without due process of law.

VI. The extra-jurisdictional operation of the EMERGENCY TAX can be further seen from a comparison of the tax the Miller Estate would have had to pay had it owned no property beyond the taxing jurisdiction of Wisconsin. This indicates that \$20,203 of the Emergency Tax paid by the Miller Estate is attributable to and measured by property located in Florida and Illinois.

VII. The extra-jurisdictional operation of the EMERGENCY TAX can be seen with especial clarity in cases where the estate of a Wisconsin decedent contains property beyond the taxing jurisdiction of Wisconsin, but where no death duties have been paid to any states other than Wisconsin. In such circumstances it is possible for the Emergency Tax to exceed the value of the entire Wisconsin estate.

VIII. The preceding examples show that in all cases where Wisconsin estates are subject to the Wisconsin Estate Tax, the EMERGENCY TAX constitutes an outright adoption by the State of Wisconsin of a portion of the Federal tax structure. Such action by a state cannot be reconciled with the rule of *Frick v. Pennsylvania*.

ARGUMENT

I.

Section 72.74 of the Wisconsin Statutes, which levies the **EMERGENCY TAX**, and which is herein claimed to result in a deprivation of property without due process of law, is one of three interrelated Wisconsin tax statutes. The taxes levied by the other two statutes are herein referred to as the **NORMAL TAX** and the **WISCONSIN ESTATE TAX**. An understanding of the problem requires an understanding of all three.

Three separate, but interrelated, Wisconsin Tax Statutes are involved in this appeal. For purposes of consistency and clarity these shall hereinafter be referred to as (1) the Normal Tax, (2) the Wisconsin Estate Tax, and (3) the Emergency Tax. It is the Emergency Tax which appellant contends has deprived him of property without due process of law. Since, however, the Emergency Tax is expressed in terms of the other two taxes, an understanding of all three is necessary in order to arrive at an understanding of the problem. We shall thus discuss these taxes individually in the order of their enactment.

II.

The **NORMAL TAX** is an unexceptional state inheritance tax. It is levied only on property within the state, and it is of importance here only in so far as it is incorporated by reference into the Wisconsin Estate and Emergency Tax Laws.

The Normal Tax was originally enacted by Chapter 44 of the Wisconsin Laws of 1903, and it now appears as Sections 72.01 through 72.24 of the Wisconsin Sta-

tutes. It is an ordinary, graduated, succession tax levied on the transfer of property passing by bequest or intestacy. It has varying rates and exemptions which are dependent on the relationship of the decedent to the recipient. It makes no attempt to tax property which is not within the taxing jurisdiction of Wisconsin, and it is of concern in the instant case only in so far as it is incorporated by reference into the statutes enacting the Wisconsin Estate and Emergency Taxes.

III.

The WISCONSIN ESTATE TAX was enacted to take advantage of the credit for state taxes granted by Section 813 (b) of the Internal Revenue Code. It is equal to the excess (if any) of the amount of the federal 80% credit over the aggregate amount of Wisconsin and other state death duties. It applies to only a limited number of Wisconsin estates, and its original effect was to require such estates to pay minimum state death duties exactly equal in amount to the federal 80% credit.

The Wisconsin Estate Tax was enacted by Chapter 426 of the Wisconsin Laws of 1931, and it appears as Sections 72.50 through 72.61 of the Wisconsin Statutes. It was copied from New Hampshire House Bill No. 227 which was the subject of the New Hampshire case, *Opinion of the Justices*, 85 N.H. 572, 154 Atl. 633 (1931), which will be further discussed hereinafter. The purpose of the enactment of the Wisconsin Estate Tax was to secure for the state full benefit of the 80% credit for state taxes paid which is granted against the federal basic estate tax by Section 813 (b) of the Internal Revenue Code. This federal basic tax is a graduated estate tax measured by the

federal estate of a decedent, containing all of his property located in any state or territory. By virtue of Section 813 (b) a credit is allowed against this federal tax, up to 80% thereof, for any death duties which may be paid to any states or territories. The actual language of Section 813 (b) granting this 80% credit is as follows:

[I.R.C. Sec. 813]

"(b) Estate, Succession, Legacy, and Inheritance Taxes. The tax imposed by section 810 or 860 shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, or any possession of the United States, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent). The credit allowed by this subsection shall not exceed 80 per centum of the tax imposed by section 810 or 860 * * *"

On the theory that it is immaterial to a taxpaying estate whether its taxes go to the federal or state government, the State of Wisconsin, like a number of other states, took measures to ensure that its death duties would be sufficient at least to exhaust this 80% credit. It accomplished this result by enacting the Wisconsin Estate Tax, and making it equal in amount to the excess (if any) of the 80% credit over the aggregate of all death duties (including the Normal Tax) paid to Wisconsin and other states. The statutory language which is material to the present discussion is as follows:

"72.50 Estate tax imposed. In addition to the taxes imposed by sections 72.01 to 72.24, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the United States revenue act of 1926, and amendments thereto, where the decedent at the time of his decease was a resident of this state. The amount of

said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding 80%, allowable under said United States revenue act, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of the estate of the decedent had sections 72.50 to 72.61 not been enacted. The tax imposed herein shall be collected by the several county treasurers for the use of the state, and shall be accounted for and paid into the state treasury within the time and in the manner specified in section 72.19. [1931 c. 426; 1945 c. 33]

"72.56 Intent of section 72.50 to 72.61. It is hereby declared to be the intent and purpose of sections 72.50 to 72.61 to obtain for this state the benefit of the credit allowed under the provisions of said United States revenue act, to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes and the same shall be liberally construed to effect this purpose. [1931 c. 426]"

It should be noted that in the great majority of Wisconsin estates, either no federal tax is levied, or if there is a federal tax, the Normal Tax exceeds the amount of the 80% credit. In such estates the Wisconsin Estate Tax does not come into play at all. Only in occasional estates, where a considerable amount of money is involved, or where the Normal Tax rates are kept low through wide distribution of the property among numerous close relations, is the Wisconsin Estate Tax applied. It is in these latter estates alone that the problem presented in the instant case arises.

IV.

The WISCONSIN ESTATE TAX is theoretically an *ultra vires* tax since it is measured by a decedent's federal estate which may include property beyond the taxing jurisdiction of Wisconsin. It is saved from unconstitutionality only by the fact that it diverts to the state tax moneys which would otherwise have to be paid to the federal government, and hence it does not result in a deprivation of property.

This Court, in the case of *Frick v. Pennsylvania*, 268 U. S. 473 (1925), has held it a deprivation of property without due process of law for a state to measure a tax directly or indirectly by the value of real or tangible personal property located outside the boundaries of the state. At the same time it is obvious that, whenever the Wisconsin Estate Tax is applied to the estate of a decedent who died owning property outside the taxing jurisdiction of Wisconsin, the Wisconsin Estate Tax is in part measured by the value of that out-of-state property. The reason for this is that the Wisconsin Estate Tax is determined, not by the value of the decedent's Wisconsin estate, but by the amount of his federal 80% credit. This 80% credit is measured in turn by the federal basic tax which in its turn is measured by the decedent's federal estate containing all his property, wherever situated.

—It may thus be concluded that the Wisconsin Estate Tax is, at least in theory, an *ultra vires* tax, since, in the words of the *Frick* case, it is measured by a standard which takes no account of the distinction between what the state has power to tax and what it has no power to tax. This would be sufficient to render it invalid under the *Frick* rule, were it not for the further fact that it cannot, by its terms, cost the taxpayer any money. The Wisconsin

Estate Tax operates only to raise state death duties to the amount of the federal 80% credit, and that amount the taxpayer is obligated to pay to someone in any event. If he did not pay it to the state, he would have to pay it to the federal government instead.

This extra-jurisdictional operation of an identical state estate tax, and the manner in which the federal 80% credit provides a compensating factor, has been recognized by the Supreme Court of New Hampshire, in *Opinion of the Justices, supra*. The New Hampshire Court discussed the question as follows:

[154 Atl. p. 634]

"The bill provides for the imposition of a tax upon property passing by will or inheritance in such an amount as will make the total of such taxes laid by states, etc., equal to the amount deductible from the federal estate tax, because so laid.

"It makes the imposition of the proposed tax dependent upon the right to deduct the same from the amount of the federal estate tax, which would otherwise be payable in full to the federal government. We are unable to perceive wherein such a provision would violate any constitutional right of the taxpayer. The amount he is called upon to contribute for the support of government is not increased because he has to pay this state tax.

"The nation lays a valid tax and makes valid provision for its partial distribution to the several states, through the process of local assessments and the deduction thereof from the federal tax. Substance, not form, governs in these matters; and this is the substance of the whole transaction. * * *

The Wisconsin Legislature (like that of New Hampshire) attempted to ensure that this compensating factor should not be exceeded by providing expressly that "such

estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of the estate of the decedent had Sections 72.50 to 72.61 not been enacted".

The Wisconsin Estate Tax is, therefore, like its New Hampshire prototype, a tax which is ultimately measured by the entire federal estate of a decedent without regard to where his property was located. So long, however, as the compensating factor of the federal 80% credit prevents it from causing a deprivation of property, its *ultra vires* character remains of theoretical importance only.

V.

The EMERGENCY TAX is a tax equal in amount to 30% of the sum of the Wisconsin Normal and Estate Taxes. When applied to Wisconsin estates which are subject to the Wisconsin Estate Tax, it has the same inherent vice as the Wisconsin Estate Tax, being measured, not by the decedent's Wisconsin estate, but by his federal estate containing all his property wherever situated. At the same time, being levied in excess of the compensating factor of the 80% credit, it causes a deprivation of property without due process of law.

In 1935, by means of Chapter 15, Section 3 of the Laws of that year, the Wisconsin Legislature enacted the so-called Emergency Tax. This tax in its present form appears as Section 72.74 of the Wisconsin Statutes, and it is levied by subsection (2) of that section as follows:

"72.74 Emergency Tax on Inheritances (2) In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61, an emergency tax for relief purposes, rehabilitation of returning

veterans of World War II, construction and improvements at state institutions and other state property and for post-war public works projects to relieve post-war unemployment is hereby imposed upon all transfers of property which are taxable under the provisions of said sections and which are made subsequent to March 27, 1935 and prior to July 1, 1949 which said tax shall be equal to 30 per cent of the tax imposed by said sections."

It is, in other words, a tax equal in amount to 30% of the sum of the Wisconsin Normal and Estate Taxes.

Since, as has already been noted, in the great majority of Wisconsin estates no Wisconsin Estate Tax is levied at all, this Emergency Tax usually operates merely to increase the rate of the Normal Tax by 30%. So long as this is its only effect, it is unexceptionable. In those Wisconsin estates, however, which are also subject to the Wisconsin Estate Tax, its effect, as construed by the Wisconsin Supreme Court in this case, is entirely different. Since the Normal and Wisconsin Estate Taxes, together with any taxes which may have been paid to other states, are, in the aggregate, exactly equal to the 80% credit, it is obvious that, in estates subject to the Wisconsin Estate Tax, the Emergency Tax is itself equal to 30% of the 80% credit after the latter has been reduced by the amount of the out-of-state taxes (if any). Further simplified, this means that the Emergency Tax, on such estates, is always equal to 24% of the federal basic tax less 30% of any out-of-state taxes. The Emergency Tax is, therefore, a tax which is measured, not by the Wisconsin estate of a decedent, but by his federal estate, containing all his property, wherever situated.

At the same time, in Wisconsin estates which are subject to the Wisconsin Estate Tax, the full amount of the

federal 80% credit is exhausted by the Wisconsin Estate Tax. Thus the Emergency Tax, being levied in addition to the Wisconsin Normal and Estate Taxes, is levied in excess of the compensating factor provided by the 80% credit, and its levy results in an actual deprivation of property.

All this can be demonstrated by means of an example. Assume a Wisconsin Estate, which owns real or tangible property outside the taxing jurisdiction of Wisconsin, and which has paid a federal basic tax of \$125,000 on its federal estate. Assume further that the Wisconsin Normal Taxes on the Wisconsin part of the estate amount to \$50,000 and that succession taxes of \$10,000 have been paid to other states. The computation used by the Wisconsin Supreme Court, in its opinion below, would arrive at the Wisconsin taxes as follows:

(1) <i>Normal Tax</i>		\$ 50,000
(2) <i>Wisconsin Estate Tax</i>		
Federal 80% Credit	\$100,000	
Less: (a) Normal Tax	\$50,000	
(b) Other State taxes	10,000	
Total State Taxes	60,000	
Difference		\$ 40,000
(3) <i>Emergency Tax</i>		
Normal Tax	\$50,000	
Wisconsin Estate Tax	40,000	
Total	\$90,000	
30% of Total		27,000
Total Wisconsin Taxes		\$117,000

These figures make it clear that the Emergency Tax of \$27,000 is levied in excess of the federal 80% credit of \$100,000. This credit has been exhausted by the Wisconsin Normal and Estate Taxes and by the taxes paid to other states (\$50,000 plus \$40,000 plus \$10,000). As a re-

sult the Emergency Tax is not subject to the compensating factor of the 80% credit, and, if it were not paid to the State of Wisconsin, would not have to be paid at all.

At the same time it should be noted that the Emergency Tax on this hypothetical estate constitutes an outright adoption by the State of Wisconsin of a portion of the federal tax structure. This is manifest from the fact that it is not even necessary to know the value of the decedent's Wisconsin estate in order to compute it. The only information required is the amount of the federal basic tax and the amount of taxes paid to other states, the computation being as follows:

Federal Basic Tax	\$125,000	
24% Thereof		\$30,000
Taxes paid Other States	10,000	
30% Thereof		3,000
Difference = Emergency Tax		\$27,000

This same simplified method of computation can be used to determine the Emergency Tax in any Wisconsin estate which is also subject to the Wisconsin Estate Tax. The additional figures in the method of computation used by the Wisconsin Supreme Court add nothing to the result, the Normal Tax being included at the start merely in order that it may be deducted at a later stage. Thus, in the estate of Fred A. Miller, an Emergency Tax of \$172,015 was assessed. The federal basic tax on his federal net estate of \$6,843,044 (including his property in Illinois and Florida) was \$788,387. The taxes paid to Illinois and Florida totalled \$57,326. Using these figures only, the Emergency Tax can be computed in the same manner:

Federal Basic Tax	\$788,387	
24% Thereof		\$189,213
Taxes paid Other States	57,326	
30% Thereof		17,198
Difference = Emergency Tax		\$172,015

Again it is emphasized that the Emergency Tax on such estates goes beyond the point where the taxpayer is compensated by the federal 80% credit, and represents an actual deprivation of property.

VI.

The extra-jurisdictional operation of the EMERGENCY TAX can be further seen from a comparison of the tax the Miller Estate would have had to pay had it owned no property beyond the taxing jurisdiction of Wisconsin. This indicates that \$20,203 of the Emergency Tax paid by the Miller Estate is attributable to and measured by property of the estate located in Florida and Illinois.

The measure of the Emergency Tax which, in the instant case, has been levied by the State of Wisconsin on property outside its taxing jurisdiction may be determined by computing what the Wisconsin taxes on the Miller Estate would have been had Mr. Miller owned no property in Illinois and Florida, and comparing them with the taxes actually assessed.

Mr. Miller's net estate for the federal basic tax (per settlement agreement) was \$6,843,043.95. The basic tax thereon was computed as follows:

Basic Tax on \$6,000,000.00	\$653,500.00
Basic Tax on \$843,043.95 at 16%	134,887.03
	<hr/>
	\$788,387.03

Mr. Miller's real and tangible personal property in Illinois and Florida was valued at \$979,936.23. The death duties paid those states aggregated \$57,325.71. The Wis-

consin Emergency Tax, as computed by the Wisconsin Supreme Court, below, was \$172,015.20.

If Mr. Miller's Wisconsin estate had been the same, but if he had not owned any property in Illinois and Florida, his net estate for the federal basic tax would have been \$6,843,043.95 less \$979,936.23, or \$5,863,107.72. The computation of the federal basic tax would then be:

Tax on \$5,000,000.00	\$503,500.00
Tax on \$863,107.72 at 15%	129,466.16
	<hr/>
	\$632,966.16

The 80% credit would be 80% thereof, or \$506,372.93. The Wisconsin taxes, computed in the manner used by the Wisconsin Supreme Court, would then be:

Normal Tax		\$220,682.12
Estate Tax		
80% Credit	\$506,372.93	
Less Normal Tax	<u>220,682.12</u>	
Difference		285,690.81
Emergency Tax		
Normal Tax	\$220,682.12	
Estate Tax	<u>285,690.81</u>	
Total	\$506,372.93	
30% Thereof		<u>151,911.88</u>
Total Wisconsin Taxes		\$658,284.81

Thus, the increase in the Emergency Tax attributable to the existence of his property beyond the taxing jurisdiction of Wisconsin is \$172,015.20 less \$151,911.88, or \$20,103.32. That this represents an Emergency Tax levied upon and measured by Mr. Miller's out-of-state property is shown by the fact that it is exactly equal to 24% of the

federal basic tax on this out-of-state property, less 30% of the taxes levied by the states of Florida and Illinois. The computation is as follows:

Federal basic tax on estate including out-of-state property:	\$788,387.03
Federal basic tax on Wisconsin estate alone	632,966.16
<hr/>	
Basic Tax on out-of-state property	\$155,420.87
24% Thereof	37,301.01
Out-of-state taxes \$57,325.71	
30% Thereof	17,197.70
<hr/>	
Difference	\$20,103.31

Since the federal basic tax on this Illinois and Florida property was assessed partly at the 15% and partly at the 16% bracket, the Wisconsin Emergency Tax actually consists of a tax at the rate of approximately 3.8% (i.e., 24% of 15.9%) on the value of this property (\$979,936.23) less credit for 30% of the taxes paid to Illinois and Florida.

VII.

The extra-jurisdictional operation of the EMERGENCY TAX can be seen with especial clarity in cases where the estate of a Wisconsin decedent contains property beyond the taxing jurisdiction of Wisconsin, but where no death duties have been paid to any states other than Wisconsin. In such circumstances it is possible for the Emergency Tax to exceed the value of the entire Wisconsin estate.

The situation where the estate of a Wisconsin resident contains real or tangible personal property located outside the taxing jurisdiction of Wisconsin, but where no

tax is payable to any state other than Wisconsin, can arise in a number of circumstances. In particular, the property may be located in a state which levies no death duties, or it may fall within an exemption granted by the state where it is located, or it may consist of tangible personal property located outside the United States. In such cases, when the estate is subject to a Wisconsin Estate Tax, the extra-jurisdictional operation of the Wisconsin Emergency Tax becomes particularly clear, since its rate then is exactly equal to 24% of the federal basic tax. Moreover, in such cases the Emergency Tax on an estate will remain the same regardless of what proportion of its property may be located within or without the taxing jurisdiction of Wisconsin.

To illustrate, let us assume that two Wisconsin residents die and that the first leaves a net estate, after deduction of debts, expenses of administration, etc., of \$600,000 located entirely in Wisconsin. The second leaves a Wisconsin estate of \$300,000 and also other property of the value of \$300,000 located outside the taxing jurisdiction of Wisconsin under circumstances where no taxes are payable to any other state. In each case the decedents' federal estates would be the same. The federal basic tax in each case would be \$17,500 and the 80% credit would be \$14,000. Assume further that the Wisconsin Normal Tax amounts to \$13,000 on the \$600,000 Wisconsin estate, and \$6,000 on the \$300,000 Wisconsin estate. These figures may be assumed arbitrarily, since, so long as they are less than the 80% credit, they have no real effect on the amount of the Emergency Tax. The following computations, performed in the manner prescribed by the Wisconsin Supreme Court, show that the State of Wisconsin would

levy the same Emergency Tax on both estates. Thus in the case of the \$600,000 Wisconsin estate:

(1) <i>Normal Tax</i>		\$13,000
(2) <i>Wisconsin Estate Tax</i>		
Federal 80% Credit	\$14,000	
Less Normal Tax	\$13,000	
Taxes paid other states	0	
Total	<u>13,000</u>	
Difference		1,000
(3) <i>Emergency Tax</i>		
Normal Tax	\$13,000	
Wisconsin Estate Tax	1,000	
Total	<u>\$14,000</u>	
30% of Total		4,200
Total Wisconsin Taxes		<u>\$18,200</u>

Likewise in the case of the \$300,000 Wisconsin estate:

(1) <i>Normal Tax</i>		\$ 6,000
(2) <i>Wisconsin Estate Tax</i>		
Federal 80% Credit	\$14,000	
Less Normal Tax	\$ 6,000	
Taxes paid other States	0	
Total	<u>6,000</u>	
Difference		8,000
(3) <i>Emergency Tax</i>		
Normal Tax	\$ 6,000	
Estate Tax	8,000	
Total	<u>\$14,000</u>	
30% of Total		4,200
Total Wisconsin Taxes		<u>\$18,200</u>

In each case not only are the Emergency Taxes of \$4,200 identical, but the total Wisconsin Taxes of \$18,200 are identical as well. Also, in each case the Emergency Tax equals exactly 24% of the federal basic tax of \$17,500. It is obvious from this example that the Emergency Tax is being measured, not by the Wisconsin Estate, which, in the second example, is half what it is in the first, but by the entire estate of the decedent which in each case remains the same.

In certain special cases of this sort, the extra-jurisdictional operation of the Emergency Tax can result in total confiscation of the Wisconsin estate. For an example of this, let us assume that the estate of a decedent resident of Wisconsin, after the payment of all debts and costs of administration, contained the following property:

Real Estate and Securities in Wisconsin	\$ 35,000
Real Estate in Nevada	\$2,000,000

Only the \$35,000 of Wisconsin property would be subject to the taxing jurisdiction of Wisconsin, but the decedent's federal estate would include his property in both states. Nevada has no inheritance or estate tax. The federal estate tax on this estate computed to the nearest dollar would be \$639,830. The federal basic tax would be \$127,650, and the 80% credit would amount to \$102,120. The proportional part of the federal taxes deductible from the decedent's Wisconsin estate under Section 72.04 (8) of the Wisconsin Statutes would be \$11,004, leaving a net Wisconsin Estate of \$23,996. Assuming that the decedent left this \$23,996 to his widow, resulting in a Nor-

mal Tax of \$180, the Wisconsin taxes on this estate would be as follows:

(1) <i>Normal Tax</i>		\$ 180
(2) <i>Wisconsin Estate Tax</i>		
Federal 80% Credit		\$102,120
Less: Normal Tax	\$ 180	
Other State Taxes	0	
	<hr/>	
Total State Taxes		180
		<hr/>
Difference		101,940
(3) <i>Emergency Tax</i>		
Normal Tax	\$ 180	
Wisconsin Estate Tax	101,940	
	<hr/>	
Total		102,120
30% of Total		30,636
		<hr/>
Total Wisconsin Taxes		\$132,756

The Emergency Tax of \$30,636 levied against this estate is again exactly 24% of the federal basic tax of \$127,650, and it exceeds by over \$6,000 the net Wisconsin estate which is being taxed. This is perhaps an extreme example, but it represents the inevitable consequence of measuring a tax by something other than the property which is being taxed.

VIII.

The preceding examples show that in all cases where Wisconsin estates are subject to the Wisconsin Estate Tax, the EMERGENCY TAX constitutes an outright adoption by the State of Wisconsin of a portion of the federal tax structure. Such action by a state cannot be reconciled with the rule of *Frick v. Pennsylvania*.

If a state desires to levy an inheritance tax upon its residents, it must enact a tax of its own which expressly takes

into account, in every one of its applications, what the state has and has not power to tax. It may not, under the rule of *Frick v. Pennsylvania*, adopt to its own use a portion of the federal tax structure. The property over which the federal and state taxing powers extend is not the same, and what is a proper measure for a tax in the one case is improper in the other. Yet the preceding examples show that the State of Wisconsin, in levying the Emergency Tax upon estates which are also subject to the Wisconsin Estate Tax, has attempted just such an adoption of the measure and structure of the federal basic tax.

The Wisconsin Supreme Court, in its opinion, made the following statement regarding the constitutional question raised in this case:

[Transcript, p. 15]

"We are of the opinion that there is no such question presented on the facts in this case. While it is true that the estate tax is imposed in a 'catch-all' manner by absorbing eighty per cent of the federal death tax, it is apparent that more than eighty per cent of the gross estate of Mr. Miller was within Wisconsin and therefore subject to taxation by this state.

"It is argued by counsel for respondent and *amici curiae* that situations might arise where such portion of the estate lay outside Wisconsin that to levy a tax under sec. 72.74, Stats. at all would be to tax property beyond the state. It would seem patent that in imposing the emergency tax, as in imposing the normal tax, care must be used to avoid taxing property beyond the jurisdiction of this state. However, we need make no further effort in pursuit of such speculation. We are met with no such situation here, since eighty-six per cent of the property belonging to the Miller estate was located in Wisconsin and the emergency tax imposed under the State's computation is upon

something less than eighty per cent of the total federal taxes. As applied to the facts of this case, therefore, the computation does not constitute an attempt to levy a tax upon nor to measure a tax by property having a situs outside of Wisconsin, and must be held to be valid."

This statement is not an adequate answer to the question. In the first place, the Wisconsin Estate Tax as construed by the Wisconsin Court, absorbed a full 80% of Mr. Miller's federal basic tax before the Emergency Tax was even applied. The Emergency Tax was levied above and beyond both the Wisconsin Estate Tax and the 80% credit. As the preceding examples have amply shown, it was measured by Mr. Miller's *entire* federal estate, and its rate is equal to 24% of the *entire* federal basic tax, less 30% of the out-of-state taxes. In the second place, the apparent import of the above statement is that, in the opinion of the Wisconsin Court, the state could levy a tax equal to 80% of the federal estate tax (whether "basic" or "additional") and still be immune to objection on the part of any estate having more than 80% of its property in Wisconsin. If this is the meaning of the Wisconsin Court's statement, it is manifestly incorrect. The objectionable feature of such a tax, under the *Frick* rule, would not be its *rate*, but the fact that it would be *measured* by a federal estate containing property beyond the taxing jurisdiction of Wisconsin. For a state to levy such a tax, equal to 80% of the federal tax, would be to set the *rate* of its tax 20% below the rate of the federal tax. This would be the only difference between the two taxes. Both taxes would still be *measured* by the entire federal estate. To contend otherwise would be to contend that a state may tax the entire property of a resident decedent at a rate, for example, of 5% of that property, and still not be subject to objection.

so long as more than 5% of the decedent's property is located within the jurisdiction of the state. So to hold would be to reverse the rule of *Frick v. Pennsylvania*, on the very facts of that case.

So long as the Emergency Tax, as construed by the Wisconsin Supreme Court, remains on the books, the only data which in all events will be necessary to compute the Emergency Tax on Wisconsin estates which are subject to the Wisconsin Estate Tax will be the amount of the decedent's federal gross estate. In those estates which have paid death duties to states other than Wisconsin the amount of those death duties will be required. In no case, however, will it be necessary to know the value of the decedent's Wisconsin estate. This anomalous situation merely emphasizes the fact that, in such estates, the Emergency Tax is a tax on the decedent's property outside the taxing jurisdiction of Wisconsin and that it is invalid under the rule of *Frick v. Pennsylvania*.

CONCLUSION

In summary of the foregoing argument, it is, therefore, respectfully submitted that the Wisconsin Estate Tax and the Emergency Tax based thereon are levied, in part, on the transfer of, or succession to, and are measured by the value of property beyond the state's taxing jurisdiction.

The Wisconsin Estate Tax, standing alone, does not result in the taking of property, since it is offset by the federal 80% credit. Since the Wisconsin Estate Tax exhausts the federal 80% credit, the Emergency Tax results in a taking of property, and a taking without due process of law, and is in direct conflict with the Fourteenth Amendment.

In the last five paragraphs of the opinion (Transcript, pp. 14 and 15) the court below indicates a consciousness of the danger of border line encroachment on the Fourteenth Amendment. The view is taken that "it is the first duty of the court to give *effect* to the law as passed if the *purpose* is lawful"; that "*The purpose of tax laws is to produce revenue for the state*"; that "Certainly *that was the purpose* of the legislature when it enacted *the emergency tax*"; and that an interpretation "giving it [the law] effect is more reasonable and must be adopted, unless to do so violates the taxpayer's constitutional guarantees." His guarantee of due process of law grows faint where the purpose to produce revenue is thus emphasized.

The concluding sentence in the opinion reads:

"As applied to the facts of this case, therefore, the computation does not constitute an attempt to levy a tax upon nor to measure a tax by property having a situs outside of Wisconsin, and must be held to be valid."

If, in order to avoid that consequence in some other case, a different interpretation will be adopted, then there is also a denial of the equal protection of the law.

J. GILBERT HARDGROVE,
Amicus Curiae

MILLER, MACK & FAIRCHILD,
Of Counsel

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OCTOBER TERM, 1949

No. 20

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OF FRED A. MILLER,**

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY BRIEF BY AMICUS CURIAE

J. GILBERT HARDGROVE,
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INDEX

SUBJECT INDEX

	Page
Introduction	1
Reply to Section I of Appellee's Brief	3
Reply to Section I A	3
Reply to Section I B	4
Reply to Section I C	5
Reply to Section I D	5
Reply to Section I E	5
Reply to Section I F	6
Reply to Section II	6

TABLE OF CASES CITED

Frick v. Pennsylvania, 268 U. S. 473 (1925)	2, 3 and 5
Maxwell v. Bugbee, 250 U. S. 525 (1919)	5

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REPLY BRIEF BY AMICUS CURIAE

The technique used by counsel for the appellee, throughout their brief, has been to restate our argument in the manner in which they wish we had stated it in the first place, and then to attack it as so restated. Since in several instances they have placed in our mouths quite the opposite of what we contend, we feel constrained to set forth in this reply brief a resumé of what our contentions really are, and then to indicate to the Court how the appellee's arguments have failed to answer these contentions.

In the first place, we are dealing only with a special type of Wisconsin estate—namely, one where the Wisconsin Normal Taxes and the death-taxes paid to other

states aggregate less than the federal 80% credit and where, therefore, the Wisconsin Estate Tax applies. Any statements made by us concerning the effect of Wisconsin tax statutes refer only to their effect on that special type of Wisconsin estate.

We contend that, in such estates, the Wisconsin Emergency Tax is, according to its terms, so computed that its amount is entirely independent of the decedent's Wisconsin estate and is measured instead by the decedent's federal estate which contains his property in all jurisdictions. This result derives inevitably from the fact that the Emergency Tax is equal to 30% of the Wisconsin Normal and Estate Taxes, and the sum of these latter taxes, when levied on such special estates, is always exactly equal to the federal 80% credit less death duties, if any, paid to other states.

Therefore, the Emergency Tax on such special estates is always exactly equal to 24% of the federal basic tax less 30% of the death duties, if any, paid to other states. Since the federal basic tax is measured by the decedent's federal estate, the Emergency Tax is also measured by this federal estate. The decedent's Wisconsin estate does not enter into the final result at all.

When, as in the instant case, the decedent's federal estate contains property outside the taxing jurisdiction of Wisconsin, we contend that a tax measured by that federal estate is measured in part by such property, and is hence in violation of the rule of *Frick v. Pennsylvania*, 268 U. S. 473 (1925).

We do not admit, as the appellant states we do, that the Wisconsin Estate Tax is a valid tax. We contend that, at least in theory, it too is an *ultra vires* tax, being measured by the decedent's federal rather than his Wisconsin estate. However, so long as this Wisconsin Estate Tax

does not cause the total taxes paid by the estate to exceed the federal 80% credit, it may be argued that the estate is not required to pay more tax than it has to pay in any event, and that therefore there is no *taking* of property.

We do not, and never have, contended that proper Wisconsin taxes may not exceed the 80% credit. This would be an absurdity, since in most Wisconsin estates the normal tax does exceed this credit. Our contention is that a tax which is levied in part on property outside the state can be saved from invalidity, if at all, only by the fact that it is not levied in excess of that credit. Once such a tax, like the Emergency Tax, is levied in excess of the 80% credit, there is an uncompensated taking of property, and, if the taxpaying estate, like the Miller estate, owns real property outside Wisconsin, the tax falls squarely within the proscription of *Frück v. Pennsylvania*.

In the light of these, our real contentions, we desire now to answer briefly each of the headings of appellee's summary of argument. The following discussion is therefore numbered in accordance with those headings.

I. Appellee states, at page 14 of its brief, that Wisconsin inheritance taxes do not operate to impose any tax extraterritorially, because such taxes cannot be asserted against any property outside the State of Wisconsin. This is immaterial. The same lack of jurisdiction which prohibits the State of Wisconsin from measuring its tax by property outside its jurisdiction may well also prevent it from undertaking collection proceedings against such property; but this is small consolation to the taxpayer, who still has to pay the entire tax out of his property in Wisconsin.

A. We fail to see where there is any question of burden of proof in this case, or any failure to present "clear

and cogent evidence". (See p. 15 of appellee's brief.) The facts of the case are agreed and the statutes involved are set out in full in the briefs. It seems therefore to us that the question is solely one for a decision by the Court based on the agreed facts and the text of the statutes.

B. Appellee claims that "factually there is no extra-territorial taxation in this case". (See p. 18 of appellee's brief.) Appellee's contention in this respect is based on the fallacy that, if a federal tax is measured by property, 87.52% of which has a taxable situs in Wisconsin, and 12.48% of which has a taxable situs outside Wisconsin, this state may import and relevy any portion of this tax, less than 87.52% thereof, and not be taxing property having a situs outside Wisconsin. That is not true. No matter how small a portion of the federal tax is imported and relevied in Wisconsin—even if this portion were only $1/10$ of one per cent of the federal tax—the portion so relevied is still measured, 87.52% by the Wisconsin property and 12.48% by the property having a situs outside Wisconsin. The only change has been in the *rate* of the tax, not in its measurement.

A tax is *measured* by property when an increase or decrease in that property causes a corresponding increase or decrease in the tax. The Wisconsin Emergency Tax, being always equal to 24% of the federal basic tax less 30% of out-of-state death duties, if any, responds to increases and decreases in a decedent's *federal* estate, but is unaffected by changes in a decedent's Wisconsin estate so long as the federal estate remains the same. It is, therefore, *measured* by the federal estate which may, and in this case does, contain property having a situs outside Wisconsin.

C. As stated before, we do not and never have claimed that the fact that a state inheritance tax exceeds the federal 80% credit establishes that it is extraterritorial in effect. (See p. 23 of appellee's brief.) What we claim is that a state tax, which is extraterritorial in effect, is stripped of the last possible argument for its validity, once it causes the aggregate state taxes to exceed the 80% credit.

D. We have never denied that, if Mr. Miller's entire estate had been in Wisconsin, his total Wisconsin inheritance taxes would have been larger. (See p. 25 of appellee's brief.) All that fact proves is that the State of Wisconsin sometimes taxes property subject to its jurisdiction at a higher rate than that at which it attempts to tax property which lies beyond its jurisdiction. The objection we make is not against the *amount* of the tax, nor against its *rate*, but against its *measurement* by property lying outside Wisconsin.

E. The appellee states at page 27 that "measurement of a tax by factors outside the state does not of itself render a tax extraterritorial". The appellee does not distinguish between the "rating" and the "measurement" of a tax. The rule of *Frick v. Pennsylvania* is that the *measurement* of a tax, directly or indirectly, by property outside a state renders the tax invalid. The appellee cites *Maxwell v. Bugbee*, 250 U.S. 525 (1919), which was distinguished in the *Frick* case, and which holds that a tax may be *rated* in proportion to a decedent's entire estate. But what has been done here is not merely to *rate* a Wisconsin tax, but to appropriate and import into the Wisconsin tax levy a portion of a federal tax which was both *rated and measured* by all the decedent's property, including property outside the state. The property that measures a tax is the property the tax rate is applied to. It must be known to compute

the tax. But to compute the Wisconsin Emergency Tax it is not necessary to have any knowledge of what proportion of a decedent's estate was subject to the taxing jurisdiction of Wisconsin.

F. Appellee argues at page 29 that the "pattern" of Wisconsin inheritance tax statutes is the imposition of taxes only on property within its taxing jurisdiction. We are not concerned here with a mere "pattern". We are concerned with the actual effect of certain tax statutes as construed by the Supreme Court of Wisconsin. The *effect* of the Wisconsin Estate Tax is to insure that there is brought into this state's treasury an amount equal to 80% of the federal basic tax less any taxes paid to other states. The *effect* of the Emergency Tax is to levy a separate tax equal to 30% of this amount. There is no "pattern" in any other tax statutes which can alter the plain fact of these effects.

H. Appellee states at page 32 that the Emergency Tax is not "directly geared" to the federal estate tax, and observes further:

"This is self-evident. On the contrary it is computed at 30% of the *amount* of two other independent taxes. By its express terms this 'emergency' tax is an amount 'equal to 30 per cent' of the amount of the 'normal' Wisconsin inheritance tax imposed by sections 72.01 to 72.24 and the Wisconsin 'estate' tax imposed by sections 72.50 to 72.61."

We wish merely to point out that these two other taxes are precisely the "gears" by means of which the emergency tax is caused to be dependent on the amount of the decedent's federal estate and independent of the amount of his Wisconsin estate.

We respectfully submit, therefore, that the appellee does not effectively meet the arguments of the appellant or the supporting arguments of *amicus curiae*.

J. GILBERT HARDGROVE,
Amicus Curiae

MILLER, MACK & FAIRCHILD,
Of Counsel

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. ~~100~~ 20

OSCAR F. TREICHER, EXECUTOR OF THE ESTATE OF
FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

MOTION BY AMICUS CURIAE FOR
PERMISSION TO PRESENT ORAL ARGUMENT

J. GILBERT HARDGROVE,
Attorney and
Amicus Curiae

MILLER, MACK & FAIRCHILD,
Of Counsel

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 547

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF
FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

MOTION BY AMICUS CURIAE FOR PERMISSION TO PRESENT ORAL ARGUMENT

This motion is made pursuant to the written consent of attorneys for appellant and appellee in the above-entitled cause, and its object is to request for the undersigned the right to deliver oral argument herein.

The facts upon which this motion is based are as follows:

1. The undersigned has previously appeared and filed a statement re jurisdiction and a brief as *amicus curiae* herein.

2. The law firm of Miller, Mack & Fairchild of Milwaukee, Wisconsin; of which the undersigned is a

partner, is counsel for the Estate of Sarah E. B. Allis, deceased, which is presently being probated in the County Court of Milwaukee County, Wisconsin.

3. Said estate of Sarah E. B. Allis, deceased, is subject to the application of the same three tax statutes, to-wit: Wis. Stats. Sections 72.01-72.24, 72.50-72.61 and 72.74, which were construed and applied by the Wisconsin Supreme Court to the Estate of Fred A. Miller in the case at bar, and which are the subject of this appeal.

4. Pending the final judgment of this Court herein, the following stipulation has been entered into regarding an appeal to the Wisconsin Supreme Court in connection with the application of said statutes to the Estate of Sarah E. B. Allis, deceased:

"State of Wisconsin
Supreme Court

In the Matter of the
Estate of

SARAH E. B. ALLIS,

Deceased.

STIPULATION

An appeal having been taken by the State of Wisconsin to the Supreme Court of the State of Wisconsin from the order determining the inheritance, emergency and estate taxes, which was made, entered and filed in the above entitled matter by the County Court of Milwaukee on the 4th day of November, 1948, which appeal involves the same issues which were adjudicated by said Supreme Court in the case of Estate of Fred A. Miller;

And it appearing that an appeal is being taken to the United States Supreme Court from the decision

of the Wisconsin Supreme Court in the said case of Estate of Fred A. Miller, the adjudication of which appeal may finally determine the questions involved in the instant estate;

Now Therefore, It Is Hereby Stipulated that the said appeal in the instant estate shall be held in abeyance pending the final adjudication of the appeal to the United States Supreme Court in the said Estate of Fred A. Miller.

Dated this 10th day of January, 1949.

MILLER, MACK & FAIRCHILD
Attorneys for Arthur W. Fairchild,
Executor

Thomas E. Fairchild, Attorney General
By Harold H. Persons
Assistant Attorney General

5. The said law firm of the undersigned is also counsel for another Wisconsin estate, in which the Wisconsin inheritance and estate taxes have not yet been determined, but wherein it is contemplated that the identical question presented in the case at bar will arise.

6. Since the probate of the estate of Fred A. Miller, deceased, and the appeals therefrom to the Supreme Court of Wisconsin and to this Court, have taken place before it has been possible to take similar steps in the two estates for which the undersigned is one of the attorneys, the executors of said two estates now find themselves in the position where their rights under the above tax statutes will be as effectively concluded by the decision of this Court in the case at bar as if they were themselves parties herein.

7. On the basis of these facts, the undersigned considers it reasonable that he should request permission to

deliver oral argument herein, since, in the absence of such permission, there will be no court in which he will have the opportunity effectively to be heard on behalf of the estates which he represents.

8. The undersigned has received written consent to make this motion from Alexander W. Schutz, Esq., the attorney for appellant herein, and from Thomas E. Fairchild, Esq., Attorney General of the State of Wisconsin, attorney for appellee. Said consent, and a letter from the Attorney General of the State of Wisconsin pertaining thereto, are reproduced in the appendix to this motion.

9. The undersigned is prepared to confine any oral argument which he may present to the subject matter contained in his brief *amicus curiae*, which is on file in this case, and which has been served on the attorneys for appellant and appellee herein within the time required for service of appellant's brief. The undersigned further agrees that his oral argument may follow immediately upon the opening argument of the attorney for appellant and precede the argument of the attorney for appellee.

Wherefore, the undersigned respectfully moves this Court that he be granted permission to present oral argument upon such conditions as this Court deems proper, and at such time as the above-entitled cause shall be heard before this Court.

Dated this 19th day of August, 1949.

J. GILBERT HARDGROVE,

Attorney and Amicus Curiae.

MILLER, MACK & FAIRCHILD,

Of Counsel.

APPENDIX

In the
 Supreme Court of the United States
 October 1948 Term
 No. 547

In re Will of FRED A. MILLER,
Deceased.

STATE OF WISCONSIN,
Appellant below,
Appellee herein,

OSCAR F. TREICHLER,
 Executor,
Respondent below,
Appellant herein.

Consent of Attorneys
 for Appellant and
 Appellee re Oral
 Argument by Amicus
 Curiae

Be It Known that the undersigned, attorneys for the Appellant and the Appellee in the above-entitled cause, do hereby consent that J. Gilbert Hardgrove, Esq., who has appeared as *amicus curiae* herein, may move this court for permission to present oral argument at the time said cause is heard.

Dated this 27th day of July, 1949.

A. W. Schutz,
 Attorney for Appellant.
 Thomas E. Fairchild,
 Attorney General of the
 State of Wisconsin.
 Attorney for Appellee.

THE STATE OF WISCONSIN
Office of Attorney General
MADISON

August 15, 1949

Miller, Mack & Fairchild
Attorneys at Law
First National Bank Bldg.
735 North Water Street
Milwaukee 2, Wisconsin

Attention: Mr. Thomas B. Fifield

Gentlemen:

Re: *State of Wis. v. Oscar F. Treichler, Extr.*

No. 547—Oct. 1948 Term, U.S. Sup. Ct.

Herewith we enclose original consent that Mr. J. Gilbert Hardgrove, *Amicus Curiae*, may present oral argument. This consent is given upon condition that any such argument will be as a part of or following the opening argument of counsel for the appellant so that it precedes our argument for the appellee, and also that the argument to be made will be set forth in a brief *amicus curiae* that is served upon us within the time required for the service of Brief of Appellant.

Yours very truly,

Thomas E. Fairchild,
Attorney General

By Harold H. Persons (s)

Harold H. Persons,
Assistant Attorney General

HHP:W

Encl. 1